Intro

Nearly forty years ago, Harvard law professor Derrick Bell analyzed the decision in *Brown v. Board of Education*[3] through a novel lens from the traditional realm of legal scholarship. In his article, *Serving Two Masters*[4], Bell argued that the strategy behind the litigation of *Brown* was driven by what he calls "'public interest' lawyers" who believed the resolution to the educational needs of black children was integration into white schools.[5] Bell identifies the issues within this schema, ultimately used to desegregate the social spheres of society, as a challenge to segregation that often led to results antithetical to the needs of the communities they represented and what those communities desired for their own educational benefit. In his subsequent essay, *The Interest-Convergence Dilemma*[6], Bell outlines a theoretical framework for the developments in his previous work. Specifically, Bell argues the decision rendered in *Brown* abolishing the doctrine of "Separate but Equal" in the interest of African Americans was determined by convergences with the interests of the white majority. Yet, as Bell articulates, this granting of rights is not the ideal anti-subordination driven decision, due largely to the Fourteenth Amendment's ineffectiveness in providing remedies that disrupt the "superior societal status of middle- and upper-class whites."[7] Bell's critiques of the *Brown* decision was a catalyst for the emergence of a new body of theoretical and scholarly developments, holistically referred to as Critical Race Theory (CRT).[8]

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[3] *Brown v. Board of Education*, 347 US 483 (1954)
[4] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE. L.J. 470 (1976)
[5] Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement*, , 5 (1st ed. 1995) [insert part about editors and compilation]
[6] Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 3 (1980)
[7] *Id*.
[8] Jelanie Cobb, *The Man Behind Critical Race Theory*, Annals of Equality, NewYorker.com (Sep. 13 2021) (https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory) ; *See* Owolade *infra* note 7

Bell has since been referred to as "the God Father of Critical Race Theory"[9] as his work was the first major piece of legal scholarship to "challenge the ways in which race and racial power are constructed and represented in American legal culture"[10] by interrogating the realities of the *Brown* decision and its effects on the education standards for black students. Bell's thought-provoking critiques of *Brown* sparked much attention in the post-segregation era as the cultural as the shift towards integration had been met with insular opposition, which came to be known officially in the southern states as Massive Resistance.[11] Regardless, Bell shifted the dynamic of academics of color in the American education structure by capturing and theorizing common cultural understanding of race and its interplay with the law.

Legal scholars were collaborating in critical studies workshops prior to the emergence of CRT[12], but, as previously mentioned, after Bell's 1976 and 1980 articles, these scholars began meeting

[9] Hani Morgan, *Resisting the Movement to Ban Critical Race Theory From Schools*, 95 The Clearing House: A J. of Educ. Strategies, Issues and Ideas 1 (2022) (citing Tomiwa Owolade, *The Godfather of Critical Race Theory*, Unherd.com (Dec. 9, 2021) (https://unherd.com/2021/12/the-godfather-of-critical-race-theory/)

[10] Crenshaw et al, *supra* note 3, at 3

[11] *Id*; Ira M. Lechner, *Massive Resistance: Virginia's Great Leap Backward*, 74 VA Quarterly Rev. 4 (1998) ([Senator] Byrd formally announced his strategy: "If we can organize the Southern states for massive resistance to this order [of the Supreme Court], I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South." Massive Resistance was born, bred, and nurtured by the senior United States senator from Virginia.); Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 The AK Historical Quarterly 2, 1 n.2 (1996)(The manifesto was printed in the Congressional Record, 84th Cong., 2nd sess., (March 12, 1956), 4459-4464. For the full text of the 'Declaration of Constitutional Principles," and a listing of all the signers, see Appendix A. Nineteen of the twenty-two senators from the ex- Confederate states (the definition of the South in this essay) signed the manifesto. They were joined by eighty-two of the region's ninety-six representatives.); [little rock nine and ruby bridges]

[12] *Id* at xviii (By the late seventies, Critical Legal Studies existed in a swirl of formative energy, cultural insurgency, and organizing momentum: it had established itself as a politically, philosophically, and methodologically eclectic but intellectually sophisticated and ideologically left movement in legal academia, and its conferences had begun to attract hundreds of progressive law teachers, students, and lawyers; even mainstream law reviews were featuring critical work that reinterpreted whole doctrinal areas of law from an explicitly ideological motivation.); *Id* at xxvii (The 1986 and 1987 CLS conferences this marked significant points of alignment and departure and should be considered the final step in the preliminary development of CRT as a distinctively progressive critique of legal discourse on race.); Duncan Kennedy & Karen E. Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L. J. 2 n.1 (1983) (Critical Legal Studies is a movement of lawyers, law teachers, social theorists, and students who are

to consolidate their evaluations of dominant American culture, white supremacy, and disparate treatment within the law.[13] This intricate group of diverse thinkers, or, the originators of CRT, began meeting in the summer of 1989 in Madison Wisconsin.[14] Twenty four law scholars—organized by Kimberlé Crenshaw, Neil Gotanda, and Stephanie Phillips, and including Kevin Brown, Mari Matsuda, Richard Delgado, Trina Grillo and others—were invited to the first workshop in Madison in an attempt to articulate, conceptualize and consolidate theoretical critiques of "racial politics in America."[15] Subsequent CRT workshops led to additional scholars—including Adrienne Davis[16], Lani Guinier, and Regina Austin—joining the efforts in interrogating racial ideologies in American political culture.

The Emergence of CRT

Bell's catalytic inquiries into the *Brown* decision attracted curious minds as to the subordination of Black people and racial hierarchies in American culture. As explained by an original participant of the CRT workshops, Kevin Brown:

> "Our CRT discussions were primarily focused upon the structure of the Supreme Court's racial justice jurisprudence, but we recognized that there is an important relationship between racial jurisprudence and mainstream American views on racial inequality. Courts do not operate independently of the cultural values of

directly or indirectly linked to the Conference on Critical Legal Studies (CCLS). The CCLS was founded at a meeting in Madison, Wisconsin in 1977; of the approximately 50 participants, a majority were academics in either law or the social sciences. Since then, CCLS has become a member- ship organization and has sponsored eight national conventions and five "summer camps" to discuss a variety of topics in the theory, teaching, and practice of law.)

[13] *See generally* Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CT L. Rev. 5 (2011)

[14] *Id*; Kevin Brown, *Critical Race Theory Explained By One of the Original Participants*, NYU L. Rev. (online feature) (2023)

[15] *Id*; Crenshaw *supra* note 11, at 1299.

[16] I currently serve as a Research Assistant to Professor Davis, and in essence of the mentorship she provides me, my understandings of CRT are largely shaped from her many reflections and perspectives for which she provides immense clarity.

> American society. Rather, there is an exchange between those cultural values and the courts' interpretations of the law— they interact with and shape each other."[17]

Produced out of these workshops were driving thoughts behind the canonical readings of CRT. The scholars in attendance began widely publishing their critiques and newfound theories of American culture and racial justice in academic journals across the nation. Renowned literature with CRT frameworks began circulating in workshops, lectures, and conferences, such as a *Critique of "Our Constitution is Color-blind"*[18], *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*[19], and *Looking to the Bottom: Critical Legal Studies and Reparations*[20]. Furthermore, concepts like " whiteness as property"[21] and "intersectionality"[22] gained widespread attention in the academy.

Although the CRT workshops ceased in 1997[23], the newly established framework continued through the twenty-first century, and CRT became a normalized, substantive course in law schools and graduate schools throughout the country. Student and faculty advocacy and activism

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[17] Brown *supra* note 12 at 137.
[18] Neil Gotanda, *Our Constitution Is Colorblind*, 44 Stan. L. Rev. 1 (1991).
[19] Derrick Bell, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 80 Yale L.J. 1325 (1971).
[20] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).
[21] Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).
[22] Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).
[23] Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 Denv. U. L. Rev. 329 n.97 (2006) (The reason for the cessation of the CRT workshops, as far as I can tell, was that the work- shop lacked a firm institutional framework to perpetuate its continuation. CRT scholars attending a workshop would be asked or volunteer to host the next workshop at their school the following year. A committee would then be established to guide the program. This differed from the process eventually established by LatCrit conference where host were identified and secured two years in advance and worked with standing officers and officials.
At the 1997 CRT workshop, Robert Westley, a coordinator of the workshop together with Sumi Cho, approached Stephanie Phillips about hosting the CRT workshop for the following year. **1,**who was attending the CRT workshop for the first time and was at that time an adjunct faculty member at the University at Buffalo Law School, encouraged her. Stephanie, however was always reluctant to host the conference again, having hosted a workshop in the early nineties. I did not push her on this and later went on to host another project. Thus, we unwittingly became part of the story of the workshop's demise.)

led to the inclusion of a course focused on the racial implications of legal doctrine into institution curricula.[24] Regardless, scholars publishing in the area began to harvest the fruits of their labor by receiving tenure and tenure-track faculty positions, endowed professorships, and deanships.[25] These scholars circulated their theorem through many channels of academia, ratifying their studies into substantive books and courses designed to teach the ideas of CRT.[26] Francisco Valdes's 2002 examination of the presence of courses focused in Latcrit[27] studies with supplementary inquiries into race or CRT courses that cover Latinx identity in law schools notes there were 20 institutions with curriculum offering courses thereof.[28] Moreover, Valdes's study shows most of these courses were taught by faculty members of color, which when analyzed through a critical theorist lens, proves arguments of the importance of epistemological

[24] Crenshaw *supra* note 11, at 1263. (In describing the committee overseeing invitations and admission to the first CRT workshop, Crenshaw finds, "[they] were all veterans, in one way or another, of particular institutional conflicts over the nature of colorblind space in American law schools."); *See generally* Crenshaw et al *supra* note 3, at xx-xxii (description of conflict at Harvard Law after Derrick Bell's protestation of a lack of woman of color on the faculty.)

[25] *See* Laura Taylor, *Prof. Bell Named U. of Oregon Law Dean*, 70 Harv. L. Rec. 5, 1 (1980); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 Iowa L. Rev. 1497, n.5 (2009)(For example, in 2008, the Connecticut Law Review dedicated an entire symposium issue to analyzing the impact of just one foundational article in CRT: Charles R. Lawrence Ill, *The ld, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN, L. REV. 317 (1987)… Additionally, in April of 2008, students at Yale Law School organized a conference that was specifically designed to "consider the development of the field [of CRT], the extent of its impact on legal practice, and its future frontiers." Yale Law School, Frontiers in Social Justice Lawyering: Critical Race Revisited.)

[26] Angela Onwuachi-Willig, *On Derrick Bell as Pioneer and Teacher: Teaching Us How to Have the Nerve*, 36 Seattle U. L. Rev. xlii-xliii (2013) [any books with CRT framework]

[27] Mutua *supra* note 23, at 351. (The critique of the white over black paradigm opened the window of recognition into the ways that the racialization of other groups in- volved the interplay of laws and practices not readily exposed by looking at the domestic experiences and conditions of blacks in the United States. It thus, opened doors for CRT to examine the relationship between race and ethnicity, racism, and nativism, and racism, nationalism, and colonialism. It also brought into focus laws related to immigration, citizen- ship, foreignness, language, and assimilation, among other issues as they related to U.S. foreign policy, and transnational and international law. These insights together with the way in which some Latina/o scholars, such as Francisco Valdes, experienced the workshop conflicts led them to institutionalize a separate space for the exploration of issues germane to Latina/o communities and Latina/o identity.)

[28] Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education -- A Curricular Study With LatCritical Commentary*, 13 Berkeley La Raza L.J. 119 (2002).

perspectives to provide anecdotal instruction of race-based courses in the academy.[29] Furthermore, it garnered CRT's momentous esteem in academia.

Attacks on affirmative action led to institutions divisive use of race in their admissions processes.[30] As the predictions of CRT scholars regarding ineffective judicial remedies to school desegregation began manifesting throughout the nation, particularly in southern states[31], institutions with liberal and leftist agendas attempted to combat the eradication of diversity in the use of their admissions procedures. The University of California at Los Angeles (UCLA) became the first elite law school to offer a concentration in CRT[32] notwithstanding challenges to affirmative action exponentially growing stronger.[33] The Court's pendulum shift towards colorblindness as an equitable remedy led to societal trends in representative diversity being abandoned. As Kevin Brown explained, "there is an important relationship between dominant American cultural attitudes about racial justice and the law's treatment of the issues of racial inequality."[34] Derivatively, as Cheryl Harris observed years before, "the imposition of colorblind rules in the community context of UCLA revealed, what much of CRT implies—that, given the normative and social structure of the United States, colorblindness is a proxy for whiteness."[35] Political objections to race conscious policies enacted to benefit communities of color were severely limited under white supremacists' efforts to underline colorblindness as an effective means to deal with the societal position of Black Americans. When analyzed through the lens of Bell's interest convergence theory, this result was predictable; Black presence in academia

[29] Matsuda *supra* note 18
[30] *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)
[31] Brown *supra* note 12 at 104
[32] Mutua *supra* note 23 at 352]
[33] *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003)
[34] Brown *supra* note 12 at 107
[35] Mutua *supra* note 23 at 353

threatened racial hierarchies and white supremacy in America, thus, white elites eliminated affirmative action programs to reinforce education disparities between Black people and their white counterparts.

Despite widespread attempts to disenfranchise institution of their commitments to diversity and following the combativeness to white supremacy in academia by UCLA's example, other institutions like Harvard and Stanford joined the forefront advocates for diversity.[36] And their practices yielded positive results in some respect.[37] Moreover, the originators of CRT were matriculating to higher positions in academia and society as their works began to hold prestige inside the academy.

In today's era of legal studies, it is expected for an institution's curriculum to contain a CRT course or some variation thereof. Even law schools located in what are considered the most conservative areas in the nation have courses examining the racial implications of the legal doctrine or critical theory. Many of these courses are taught by the originators of CRT scattered throughout the nation, while others are taught by the wave of scholars succeeding the original members of the movement. With the normalization of these courses implemented into institutional curricula, the recent challenges by legislators may have shocked observers as the fervent attacks on CRT began, but, in what I will describe as "interest re-convergence," that, as Bell explained, is constantly assuring of racial subordination in American culture, these attacks were expected, and respectively, predicted by critical scholars.

[36] *Id* at note 28; *Grutter v. Bollinger*, 539 U.S. 306 (2003)
[37] *See generally* Brown *supra* note 12

Kevin Brown's essay, *Critical Race Theory Explained by One of the Original Participants*[38], articulates recent political attention towards CRT initiated by former-President Donald Trump who "sought to exclude diversity and inclusion training from federal contracts, if those trainings contained so-called 'divisive concepts' like stereotyping and scapegoating based on race and sex." Brown further explains how former-President Trump's Executive Order[39] is what sparked the widespread attacks on CRT and diversity across the nation.[40] Brown continues,

> These attacks on CRT are directed towards preventing efforts to teach the history of American racial oppression, as well as preventing diversity, equity, and inclusion training today. It is part of an antidemocratic effort to attenuate the multiracial democracy that America is becoming and to obscure the continued racial inequality that exists.[41]

In examining these fanatical attacks by the federal government and their continued efforts towards a colorblind society, a recategorization or reevaluation of subordination is necessary in a capitalistic regime that already determines the livelihoods of people of color in society based on their proximity to Blackness. Moreover, as legal scholar Michelle Alexander explains, "the emergence of each new system of control may seem sudden, but history shows that the seeds are planted long before each new institution begins to grow."[42] Thus, one examining is left to ask, what essentially is the end-goal of institutions and their leaders under thrall of colorblindness? What is a more stringent form of subordination and what is sought of the additional parameters of enforcing this subordination? Lani Guinier and Gerald Torres note in *The Miners Canary*,

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[38] Brown *supra* note 12; Thanks to Professor Kimberley Norwood, Our Education Law class at Washington University School of Law was able to hear Kevin Brown's iterations of his article in-person. It was both exhilarating to be witness of Professor Brown, and, disheartening to learn of the expected defeat in the present-day struggle for equitable education in America.
[39] *Id*.
[40] Brown *supra* note 12 at 102
[41] *Id*.
[42] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010).

"[o]nce Blackness becomes the face of failure, race then influences and constrains social, economic, and political opportunities among and between Blacks and whites and among and between Black people and other people of color.[43] In what I classify as "racial obliteration" can be used to understand the results of the re-converging of interest between elite whites and poor whites under the current racial hierarchy in modern American society, and the dominant culture's expectations of subordination where a society has achieved supremacy for the racial categorization of whiteness—devoid of class identity. [44]

CRT IMPACT ON PUBLIC EDUCATION

[SECTION TO LINK THE VALIDATION OF CRT CONCEPTS IN GRADUATE SCHOOLS TO THE EMERGENCE OF AFRICAN AMERICAN STUDIES PROGRAMS IN COLLEGIATE AND K-12 EDUCATION SPACES]

Interest Divergence

As Bell's theory of interest convergence can be used to conceptualize the constitutional principle driving the *Brown* decision, many variables persisted throughout this era and contributed to the machinations of racial subordination. As the renowned legal scholar Lani Guinier interprets in furtherance of Derrick Bell's theory of interest convergence, there was a simultaneous diverging of geographic, racial, and class-based interests at work in the Brown and post-Brown era.[45] Guinier further explains the divergence between elite whites and poor whites occurred thoughtlessly as these groups sought to preserve their supremacy through their racial identity.

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[43] Lani Guinier, From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, 113 Yale L.J. 1073 at 109 (2004)

[44] Arguing white people have supremacy beyond real time experiences as white people. There are instances where simply being categorized as white positions a person ahead of a person of color, such as income, housing, and disaster disparities.

[45] Guinier *supra* note 41 at 98

She classifies the ideology of racial liberalism as the mechanism causing "the class and geographic interests of rural and poor southern whites—and of working-class northern whites—also receded from view. The poor whites who could not participate in de facto[46] segregation or white flight[47] viewed themselves at victims and recognized desegregation as downward economic mobility.[48] Guinier brilliantly explains the exploitation of the sense of loss felt by poor whites by "demagogic politicians, who have successfully used racial rhetoric to code American politics to this day and who continue to solidify the bargain between poor and wealthy southern whites."[49] Finally, she notes the regional differences between these two classes are non-existent when race and class are disaggregated.

CRT and the Interest Re-Convergence Dilemma

As explained, Bell's theory argues that the "interests of Blacks in achieving racial equality will be accommodated only when it converges with the interests of whites," and our current constitutional remedies will not provide effective racial equality for Blacks where it would threaten the supremacy of the white elite class." Black rights are granted under the influence of these convergences. Implicit of this theory is that Black rights are repealed when progression of the Black community threatens the regulatory regime of the racial hierarchy in America, causing the interests of the white elites to realign or "re-converge" with poor and working-class whites to preserve the order. I argue that the occurrence of this re-converging of interests or preservation

[46] *Id* at 102
[47] William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 68 Am. Soc. Rev. 412 (2003).
[48] Guinier *supra* note 41 at 102
[49] *Id* at 103

of the racial-hierarchical structure that already dominates all aspects of American culture is more predatory than envisioned; it is precedential to the racial obliteration of Black people.

In examining the re-converging of interests between elite whites and poor and working-class whites, I will begin focus on Donald Trump's Presidential campaign and administration to pragmatize the argument that the current era of subordination is aiming for racial obliteration.

It is a commonality in reviewing Donald Trump's Presidential campaign and administration to consider his appeals to poor and working-class white rhetoric to foster his political leadership. During his time in office, former President Trump agitated racial tensions in America, recasting pressures between Black people and their white counterparts. Scholar have largely referred to the election of Donald Trump as whitelash from the majority for the election of the first Black President, Barack Obama, for two consecutive terms.[50] The following arguments are not to dispel any current understandings of racial tropes in circulation, but in reexamining dominant American culture and subordination, for which remained prevalent under the Obama administration and beyond, but to show the predictions derived from CRT on the various shortcomings of racial justice in the post-*Brown* era were made with paramount accuracy, as if these theorem were whispers from the God Apollo and Derrick Bell was his oracle and priest.[51]

Social Science identifies many variants contributing to the success of Donald Trump's Presidential campaign. Some scholars refer to it as an amalgamation of sociopolitical and economic dynamics, including "an ongoing class struggle in the context of increasing economic

[50] Terry Smith, *Whitelash: Unmasking White Grievance at the Ballot Box* (Penguin Random House, 2018)
[51] Kurt Latte, *The Coming of the Pythia*, 33 Harvard Theological Review 9–18 (1940)

and social inequality, with a focus on the 'revenge' of a downwardly mobile white working class that feels ignored by progressive elites,"[52] and "racism and race resentment in a post-Obama era."[53] While Lani Guinier has previously established poor and working-class white resentment of the elite white class after the *Milliken v. Bradley*[54] decision, which held that only schools that practiced intentional desegregation were constricted by desegregation plans, and affected the lower class unable to participate in white flight and continued through the affirmative action era.[55] In applying Bell's framework to these conclusions, I argue that Donald Trump's campaign was the catalyst of interest re-convergence between elite whites and poor and working class whites. Furthermore, when analyzing voter demographics during the Trump campaign, which was made up of mostly middle-class whites, it was his appeals to the poor and working-class white people that tipped the scales in his favor[56], which provides quantitative evidence of the re-converging of interests of between elite whites and poor and working-class whites.

As the Trump campaign and election was a catalyst for interest re-convergence, his success did not provide whites the satisfaction to revel, or enough boredom to antagonize their winnings as a Lion would over an easy kill. And while this success is evidentiary of interest re-convergence, Former-President Trumps issuing of Executive Order 135 as white Republican President with a majority Republican senate is evidentiary of racial obliteration. The subordinate position of Black people in American society had not shifted much within or beyond the social realm during the Obama administration, yet whites saw his Presidency as a blatant attack on their supremacy.

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[52] Michèle Lamont, et al, *Trump's Electoral Speeches and His Appeal to American White Working Class*, 68 British J. Socio S1, S154 (2017)
[53] *Id*.
[54] 418 U.S. 717 (1974).
[55] Guinier *supra* note 41 at 101
[56] Lamont, et al, *supra* note 50

Insomuch, former-President Trump's Executive Order acquired support from whites of all class identifications, and they began advocating for the eradication of these "divisive concepts" from public education. Whites enforcing variations of this Executive Order and its rhetoric are looking beyond CRT to prohibit any instruction of racial identity in K-12 and collegiate education. While considering the stagnancy of Black people under subordination, this elimination of education of racial identity is classified as what I label racial obliteration, stemming from this elimination of racial concepts and identity.

Emerging from this chaos is name specific bans on books and scholars in a regime to which I compare to the effects of communist labeling during the McCarthyism era.[57] Toni Morrison, Alice Walker, and Kimberlé Crenshaw alike have been labeled as radical extremist by white lawmakers and their works have been banned from schools. The effects of this legislation has trickled onto the higher education spheres. Diversity and inclusion offices have been eradicated from colleges across the nation. In fact, Harvard recently faced a challenge to its practice of race-conscious admissions policies and awaits a decision from the Supreme Court.[58] As the interest of elite whites and poor and working-class whites re-converge in a structure that already positions Black people as subordinates, the only goal that can be interpreted of this elimination of CRT and diversity is racial obliteration. As the originators of CRT advocated for juridical enforcement of remedies to the pollical, economic, social inequities of Black people, their white counterparts invoked colorblindness into pragmatism. Now, as their predictions of the harms that society

[57] *See generally* Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South* (Louisiana State University Press 2004).
[58] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. denied, 142 S. Ct. 401 (2021).

would face are manifesting, their legacies are being eliminated from the intuitions that produced their work.

Conclusion

In analyzing the eradication of CRT and diversity, one could attempt to tether this phenomenon to Presidential administrations, but, I argue the occurrence of such phenomena under the current democratic rule is evidentiary of white interest re-convergence. Derrick Bell and other CRT scholars understood both the shortcomings of adjudications involving racial equity and the societal implications of these rulings. In theorizing these shortcomings, Bell implicitly distinguished how Black rights are both granted and repealed. Furthering Bell's arguments to analyze the repeal of Black rights by the dominant American culture and the continued subordination of Black people can justify white supremacists' goal of racial obliteration. Where a society has acclaimed identity as a tyrannical force of cultural erasure, particular attention should be paid to the political majority and its agendas. As Lani Guinier states in her critique of the exclusionary functions of our majority-rules democracy, "we need to focus on creating a more inclusive and deliberative democracy that values and respects the voices of all citizens, not just the majority."[59]

[59] Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (Free Press 1994).

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Journal(s)	**International Law Journal**
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June 23, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to apply for your next available clerkship position after I graduate in 2024. I am currently a third-year student at Harvard Law School, where I am involved with the Capital Punishment Clinic and Prison Legal Assistance Project, and serve as a research assistant and teaching fellow for several professors

Enclosed are my resume, law school transcript, and writing samples. The following professors will submit letters of recommendation under separate cover and welcome inquiries in the meantime:

Noah Feldman	Michael Klarman	Maureen Brady
nfeldman@law.harvard.edu	mklarman@law.harvard.edu	mbrady@law.harvard.edu
617-495-9140	617-496-2050	617-384-0099

I have sharpened my skills in legal research, analysis, and writing in several academic and professional settings which are outlined on my resume. Across these experiences, I have developed a special pride in my situational awareness and attention to detail. Living with a severe visual impairment for most of my life has given me a unique appreciation for the value of increased awareness, and I work hard to guarantee that my work reflects a great deal of care and awareness so that it can serve both my clients and the broader community at the highest level. In addition to my strong work ethic and attention to detail, I have an excellent aptitude for collaborative and team-oriented work. Through my work in athletic and academic competition, I understand that the whole is always greater than the sum of its parts. I would relish the opportunity to apply my collaborative skills in your chambers.

Should you require additional information, please do not hesitate to let me know. Thank you for your consideration.

Sincerely,
Parker Ferguson
Parker Ferguson
Enclosures

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Activities: Harvard Prison Legal Assistance Project, Student Attorney
Capital Punishment Clinic, Sween Law
Teaching Fellow: Property (Fall 2022), Criminal Law (Spring 2023)
Harvard International Law Journal, Submissions Editor

MIDDLEBURY COLLEGE, Middlebury, VT
Bachelor of Arts, *summa cum laude,* in Political Science, May 2019
Thesis: *Liberty and Tradition: An Exploration of Substantive Due Process and Fundamental Rights*
Honors: Academic All-Conference, NFF Hampshire Honor Society (College Football Academic Honors)
College Scholar
Study Abroad: Universidad Carlos III de Madrid, Madrid, Spain, Spring 2018 (full language immersion)
Activities: Varsity Football, Pride Group Leader
Junior Varsity and Intramural Hockey, Team Captain

EXPERIENCE

SUSMAN GODFREY LLP, Houston, TX
Summer Associate, July 2023 – August 2023

CRAVATH, SWAINE & MOORE LLP, New York, NY
Summer Associate, May 2023 – July 2023

HARVARD LAW SCHOOL, Cambridge, MA
Research Assistant to Professor Michael Klarman, June 2022 – Present
Summarized constitutional jurisprudence and scholarship for students in Constitutional Law course. Researching history of race and sports for forthcoming project.

Research Assistant to Professor Christopher Lewis, September 2022 – November 2022
Provided line edits and substantive research for forthcoming philosophy article on racial justice.

TENNESSEE OFFICE OF THE POST-CONVICTION DEFENDER, Nashville, TN
Legal Intern, May 2022 – August 2022
Wrote memoranda and briefs on prosecutorial misconduct, ineffective assistance of counsel, and other constitutional claims for indigent death-row inmates in state collateral proceedings.

SULLIVAN & CROMWELL LLP, New York, NY
Litigation Paralegal, July 2019 – June 2021
Prepared key documents for court filings, client interviews, depositions, and government presentations in complex civil, securities and white-collar matters. Conducted factual investigation, research, and preliminary document review in preparation for bail hearings, proffer sessions, and sentencing proceedings in federal criminal court.

VOLUNTEER

SOUTH BRONX UNITED SOCCER, Bronx, NY, *Head Coach – Boys U8*, September 2019 – May 2021

READ AHEAD, *Literacy Promotion Mentor*, September 2015 – May 2021

PERSONAL

Spanish (fluent). Interested in literacy promotion, alpine skiing, NHL hockey, and personal fitness/wellness.

Harvard Law School

Date of Issue: June 6, 2023
Not valid unless signed and sealed
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Record of: Parker Ferguson
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 3 Greiner, D. James	P	4
1001	Contracts 3 Lessig, Lawrence	P	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	P	2
1003	Legislation and Regulation 3 Stephenson, Matthew	P	4
1004	Property 3 Brady, Maureen	H	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Franklin, Morgan	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 3 Bowie, Nikolas	H	4
1002	Criminal Law 3 Lewis, Christopher	H	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	P	2
3106	Power: Ethics, Means, Ends Feldman, Noah * Dean's Scholar Prize	H*	4
1005	Torts 3 Ziegler, Mary	H	4
	Spring 2022 Total Credits:		18
	Total 2021-2022 Credits:		39

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2020	Capital Punishment in America Steiker, Carol	P	4
2048	Corporations A Spamann, Holger	H	4
2050	Criminal Procedure: Investigations Crespo, Andrew	H	4
	Fall 2022 Total Credits:		14

Winter-Spring 2023 Term: January 01 - May 31

8005	Capital Punishment Clinic Steiker, Carol	CR	5
	Winter-Spring 2023 Total Credits:		5

Spring 2023 Term: February 01 - May 31

2366	Complex Litigation: Legal Doctrines, Real World Practice Clary, Richard	P	2
2453	Constitutional History II: From Reconstruction to the Civil Rights Movement Klarman, Michael	P	3
2079	Evidence Rubin, Peter	P	2
2140	Jurisprudence Brewer, Scott	H	3
	Spring 2023 Total Credits:		10
	Total 2022-2023 Credits:		29

Fall 2023 Term: August 30 - December 15

3216	Advanced Constitutional Law Feldman, Noah	~	4
2035	Constitutional Law: First Amendment Feldman, Noah	~	4
2445	Deals Subramanian, Guhan	~	2
2169	Legal Profession Gordon-Reed, Annette	~	3
2249	Trial Advocacy Workshop Sullivan, Ronald	~	3
	Fall 2023 Total Credits:		16

Spring 2024 Term: January 22 - May 10

2086	Federal Courts and the Federal System Fallon, Richard	~	5
	Spring 2024 Total Credits:		5
	Total 2023-2024 Credits:		21

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Parker Ferguson

Date of Issue: June 6, 2023
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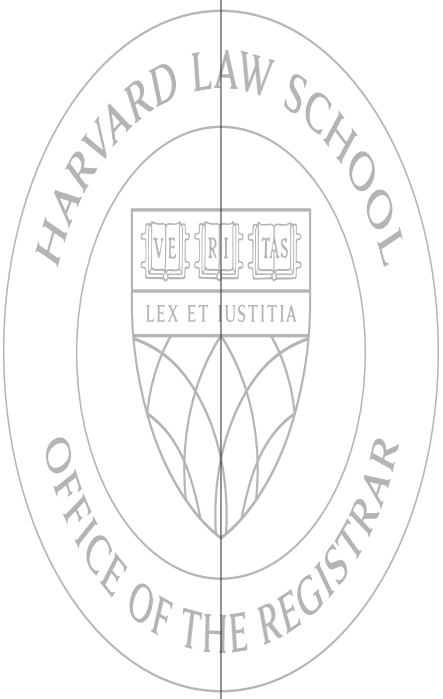
Total JD Program Credits: 89

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in support of the clerkship application of Mr. Parker Ferguson, who is a member of Harvard Law School's Class of 2024. I have gotten to know Parker quite well over his first two years of law school. He enrolled in my 1L reading group in the fall of 2021, worked as my research assistant from the summer of 2022 through the spring of 2023, and was a student in my Constitutional History II class ("From Reconstruction to the Civil Rights Movement") in the spring of 2023. Parker is smart, articulate, knowledgeable about American politics and history, incredibly hard-working, and dependable. He is also a likeable and, indeed, an admirable young man. He will make some fortunate judge an excellent judicial law clerk, and I recommend him to you with enthusiasm.

As noted, Parker took my 1L reading group in the fall of 2021, his first semester of law school. This class was entitled "Courts, Social Change, and Political Backlash," and we spent a week on Brown and school desegregation, a week on Furman and the death penalty, a week on Roe and abortion, and a week on Obergefell and gay marriage. (These 1L reading groups meet 4 times a semester for 2 hours per session.) The point of this particular reading group was to get students thinking about the political backlash that court decisions that deviate significantly from public opinion can produce—not necessarily by way of criticizing the rulings, but simply to advance the students' understanding of how court decisions fit into a social and political context and how they are part of a conversation rather than providing a definitive resolution.

That semester's reading group was a strong one, and I got to know the students especially well (perhaps in part because this was the "comeback" semester from COVID, and I encouraged them to visit me during office hours—usually held on my back patio, where we could meet unmasked). Parker was one of the two or three strongest contributors to class discussion. Here are some notes I jotted down during a visit Parker made to office hours that fall:

> (September 2021) Parker: Came to office hours on the back patio the other day. We chatted for about 45 minutes, mostly about various issues raised by the reading group materials, such as abortion, but also about the current existential threat to American democracy. He's had a couple of Con Law courses in college, and it comes out in the class discussions that he knows a lot of cases and a lot of American constitutional history. He's been one of the two most active participants in class discussion, and a very good one. During office hours, I found him quite personable and engaging; very likeable. He is confident but not arrogant, very thoughtful, fully conversant with current events and aware of how bad the current situation is [in terms of the threat posed to democracy].

I kept fairly detailed notes of the class discussion on my computer (a habit I developed during the pandemic, when an entire academic year was spent online), so I can provide you with a fair amount of information regarding Parker's contributions to class discussion, which were consistently of a very high quality.

Our first class session of the reading group was on Brown v. Board of Education. I began the discussion by asking the students about the meaning of a memo, which appeared in the reading materials, written by law clerk William H. Rehnquist to Justice Robert Jackson arguing that the Court should not overturn Plessy and strike down school segregation. Parker nicely explained for the class what Rehnquist meant by the "Lochner era"; how that era had come to an end with President Roosevelt's threat of Court packing and Justice Owen Roberts's famous "switch in time"; and how school segregation might be morally abhorrent but that did not necessarily make it legally objectionable, given the understanding of Justices such as Jackson and Frankfurter as to what counted as legitimate sources of constitutional interpretation (materials such as text, original understanding, and precedent). Later in the discussion, Parker offered the important observation that African Americans in the South had a very difficult time enforcing Brown because bringing lawsuits was both expensive and likely to incite violent resistance, especially in states such as Mississippi and Alabama.

In the reading group's second session, on Furman v. Georgia (1972) and the death penalty, Parker once again played a leading role. He explained that not all of the Justices in 1972 were prepared to invalidate the death penalty, as reflected in their decision four years later in Gregg v. Georgia. Yet, Parker added, lawyers for the NAACP Legal Defense Fund could hardly have known this, especially after the Court's revolutionary decision in Brown v. Board—an excellent point, I thought.

Later in the discussion, Parker noted a difficult question confronting lawyers advocating for social change: How to balance providing the best possible representation to their clients against the desire of social reform movements not to force issues upon judges before they are likely to be ready to rule in favor of the claim. ACLU lawyers in Hawaii faced precisely this dilemma when clients came to them seeking same-sex marriage in the early 1990s—well before the national gay-rights organizations thought such litigation likely to succeed in court.

Later in the class, in response to another student who had suggested that the lawyers challenging the death penalty in the late 1960s and early 1970s should have made the litigation more explicitly about race, Parker raised the objection that no death penalty statutes at that time expressly classified based on race. At most, the death penalty was being administered in a way that produced racially disparate impacts—which, as Parker noted, the Court would soon rule an inadequate basis upon which to raise

Michael Klarman - mklarman@law.harvard.edu - 617-495-7646

a Fourteenth Amendment equal protection claim.

In the reading group's session on same-sex marriage and Obergefell, Parker again was a major contributor to class discussion. He incisively noted the difficulty in separating one's views on judicial activism from one's views on the substantive merits of particular controversies, such as school segregation, abortion, and gay marriage. He noted some of the problems with originalism as a theory of constitutional interpretation, as well as pointing out that the conservative Justices who purport to be originalists are inconsistent in their invocation of that constitutional methodology. For one thing, Brown v. Board of Education is hard to defend as an originalist decision. In addition, those Justices stop speaking originalist language when voting to strike down race-based affirmative action or campaign-finance regulations. I recorded in my notes Parker's "very good" point that conservatives' expressed concern with regard to liberal overreach from the bench seems "exaggerated," given the "very limited" power that the Court exercises in contravening dominant public opinion. When the Court "goes too far," Parker noted, the Justices "reveal their own impotence." The Court's interventions on the death penalty, Parker observed later in this final session, demonstrated how constrained the Justices are when they try to frustrate public opinion.

Parker also explained to the class the connection between Roe v. Wade and the rise of the Federalist Society, which has proved a powerful mechanism for judicial transformation. In addition, Parker raised the excellent question of whether the conservative Justices' invalidations of campaign-finance regulations and gun control measures are any better grounded in the Constitution than liberal rulings such as Roe and Obergefell. Finally, Parker insightfully noted that Obergefell produced much less backlash than prior rulings such as Brown, Furman, and Roe, and he rightly observed that Republicans have shifted their focus in recent years away from gay marriage to transgender rights because of changing public opinion. Parker also made the terrific point that a judicial ruling on gay marriage is much more difficult to evade than one, for example, on abortion or school desegregation.

Based on his stellar performance in the reading group, I was delighted when Parker expressed interest in working for me about 20–25 hours a week during part of the summer of 2022 in response to an advertisement I had posted. Parker continued to do occasional work for me during the academic year 2022–23. His main job in the summer and fall was helping me prepare and review course materials for Constitutional Law, which I had decided to redo from scratch, abandoning the casebook I had been using for the previous 35 years. All told, Parker completed assignments on school desegregation, affirmative action, the rise and fall of Lochner, rational basis review in equal protection, as well as portions of several additional assignments.

Parker was a specular research assistant. He showed initiative, good judgment, and impressive doggedness in putting together draft assignments, and then he displayed care and attention to detail in proofreading the final version of those assignments. I recorded a bunch of notes that summer after reviewing the various assignments Parker compiled for me. Please allow me to simply reproduce those notes for you here:

> Going through his first draft of school desegregation which looks great from a quick perusal. Impressive how much he went through and how quickly.
> Did a really great job summarizing some very complicated cases like Dayton and Columbus on school desegregation.
> Going through the desegregation assignment around July 15: Parker did a wonderful job choosing choicest excerpts from The Brethren on the Swann case. Terrific job editing that opinion down to essentials. Very good in giving factual summary of what was involved in Keyes.
> The Sapphire article he found for me on Equal Protection was super helpful. Generally did a really nice job coming up with and editing excerpts from McCloskey, Sunstein, Sapphire
> 8/12/22: in his proofread of School Desegregation III it was very helpful that he not only found New York Times articles but actually summarized in a way that I could just plop them down in the assignment
> 8/21: really grateful to him for working hard til end of summer, taking on big assignments like Lochner but also willing to do proofreading in last week of summer.
> 8/24: he is doing multiple proofreading assignments for me this week; really appreciate his willingness to devote so much time; he's been an enormous help; has done a very careful job on proofreads; caught a lot of stuff I wouldn't have; meticulous; reliable; incredible work ethic.
> 9/5: I sent Parker the following note via email: "I finally made it through your draft of the affirmative action assignment yesterday and today. This must have taken an enormous number of hours. I really like what you did. It was a huge help. I've cut it down from 82 to 55 pages, so that's pretty good. I may be able to cut a couple more pages when I go through it one final time. In any event, I just wanted to thank you for doing such a good job on a tough assignment."
> Note to myself: I think what was so impressive was that he did so many different things and must have had to do a ton of retyping in the process. [We were trying to give the students all of the reading in neat Word files, rather than photocopies and .pdfs, so a good deal of retyping was required.] Picked a really good excerpt from B'nai B'rith brief in Bakke, from The Brethren on Bakke, from Sanders article, Ely article, Schnapper article on affirmative action.
> 10/3: had lunch on back patio today with Parker. We talked some about his classes and some about his summer, but a lot about his experience with football, his views about the importance of learning to be a part of a team. I found him extremely thoughtful and admirable. He told me about his volunteering to do youth coaching in the Bronx during his time in NYC. He is very upbeat and personable. Also seems to like to be involved with lots of different things at the same time and very efficient with his time, balancing various responsibilities.

During this past spring semester, Parker continued to work for me, this time reading and writing a memo on a book that is pertinent to my current project, which is writing a book on race and sports in American history. The book was William C. Rhoden's $40 Million Slaves: The Rise, Fall, and Redemption of the Black Athlete (2006). (Rhoden was a sports columnist for the New York Times.) Parker wrote me a brilliant 18-page memo summarizing the book. He demonstrated proficiency at boiling down chapters

to their essences, telling me what I needed to know in a few paragraphs per chapter. Parker also provided helpful lists of the principal sources upon which Rhoden relied—to enable me to pursue those sources for myself in the future, should they prove to be of sufficient interest. I especially appreciated his method of providing me with quotations, followed by the primary sources from which they were taken, which Rhoden often left undated; this should make it easier to track down these sources in the future.

To illustrate Parker's strong writing skills and his impressive ability to write precisely and economically, here are two paragraphs from Parker's memo summarizing one of Rhoden's chapters:

> In Chapter Three, Rhoden tells the story of the black jockey. Rising to dominance beginning with the quarter-mile match races of the seventeenth and eighteenth centuries, the black jockey would almost completely disappear by the early twentieth century. This disappearance, Rhoden argues, was due to a confluence of powerful forces—owners and trainers who stopped hiring them, white jockeys who ganged up on them, and the Jockey Club that systematically denied the reenlisting of blacks. Black jockeys became the victim of what Rhoden terms "Jockey Syndrome," or the changing of rules to maintain control in the face of a perceived challenge to white supremacy. For Rhoden, Jockey Syndrome represents the primary mechanism for tilting the ostensibly level playing field of sport away from equal opportunity and toward white supremacy.
> Rhoden begins the chapter with Isaac Murphy's 1890 triumph over Snapper Garrison at New York City's Coney Island Race Course before giving a brief account of how black jockeys came to dominate horse racing. Tracing the stronghold back to the Revolutionary War, Rhoden observes that black trainers, grooms, and riders not only cared for their master's horses, but also hid them from British troops. In addition, time spent with horses during the course of their work on the plantation produced a rapport with the animals that translated into stellar performance. In fact, Rhoden points out, the first outstanding quarter-horse jockey was a slave named Austin Carter. However, unlike successive waves of baseball players, cyclists, and heavyweight boxers, black jockeys did not initially encounter much resistance. Rather curiously, the black jockey's dominance was accompanied by a reputation for honesty and integrity, and praise in contemporary news outlets. To explain this phenomenon, Rhoden points to the nature of horse racing: talented jockeys were necessary to ensure the highest return on investment for white horse owners. The success of black jockeys benefited white owners and fit neatly into the pattern of dependency and non-self-sufficiency characteristic of slavery and white supremacy. For example, Charles Stewart's success allowed him to accumulate wealth equal to that of his masters, yet he remained enslaved. In this sense, Rhoden argues, the black jockey's success reinforced the plantation power dynamic, whereby money does not necessarily alter one's status as "slave," as long as the "owner" is the one who controls the rules that allow that money to be made. It is this dynamic that Rhoden will later trace forward to sports integration in the late 1940s.

Parker has compiled a fine academic record at HLS. After a mediocre first semester, Parker has adjusted well to law school exams, earning mostly Honors grades, including a Dean's Scholar Prize in one of his classes. As is characteristic of Parker, he has also immersed himself in a wide variety of service and extracurricular activities at Harvard Law School, including working as a teaching fellow for two classes, serving as editor on one of the student law journals, and performing clinical work pertaining to prison legal assistance and capital punishment.

In sum, Parker is incredibly hard-working, bright, intellectually and socially engaged, articulate, and reliable; he also possesses an upbeat and pleasing personality. He was enormously helpful to me as a research assistant, and I was astonished at both his capacity for hard work, and the care and precision with which he accomplished assigned tasks. I am confident that Parker Ferguson will make some fortunate judge an exemplary law clerk. I recommend him to you with great enthusiasm.

Yours sincerely,

Michael Klarman

Michael Klarman - mklarman@law.harvard.edu - 617-495-7646

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Parker Ferguson for a clerkship in your chambers. I got to know Parker when he was a student in my course on power and ethics in Spring 2022. In class, Parker was a thoughtful and enthusiastic participant. On the exam, he stood out very strongly, earning a Dean's Scholar prize, our equivalent of an A+. The exam called for synthesis of policy and legal issues, with an emphasis on foundational theories of ethical behavior. I was impressed by Parker's breadth of knowledge and his concise, powerful, sharp writing.

I wish I could say I have gotten to know Parker better since then, but the truth is that I don't have a strong sense of him as a person outside of class. I'm impressed by his sense of purpose as a varsity college athlete. He left on me a very positive impression, which I fear will have to suffice for the purposes of this letter. I'm certainly happy to recommend him on the basis of his excellent performance in my course.

Yours sincerely,
Noah Feldman
Felix Frankfurter Professor of Law
Harvard Law School
Cambridge, MA 02138

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

It is my pleasure to recommend Parker Ferguson for a judicial clerkship after his expected graduation date of May 2024. His accomplishments and activities at Harvard Law School speak to his impressive capabilities, and I have no doubts that he would flourish as a clerk.

Let me say a word about how I have gotten to know Parker. Parker was a student of mine in a required first-year class on Property Law in the Fall of 2021. I require my students to do a significant amount of writing in my courses, including weekly reading responses and short papers. I appreciated Parker's thoughtful work immensely. Parker is a student who always goes beyond the minimum required and pushes on his own initial reactions to try to understand the reasoning behind rules or institutions. One assignment that I particularly enjoyed resulted from an assignment where students had to observe Housing Court. Parker wrote a reflection after watching proceedings, noting the necessary efficiency of the process, but also the clear difficulty that many tenants had in understanding or arguing about standard lease terms when put up against repeat-player landlords. Apart from just reacting to the scene, Parker proposed concrete measures that he thought might help—simplified lease terms corresponding to the most enforced provisions, even doctrinal explainers—which impressed me, since the assignment required only a few short paragraphs of summary. All of Parker's assignments ended up having these characteristics: insightful observations, grounding in cases and principles, and clear prose.

Given the quality of his contributions throughout the course, I expected Parker to do well on the final. He did not disappoint, earning an Honors grade in the course as a whole. (Our curve in first-year courses is unyielding and also unpublished, so trust me when I say that this is an significant achievement.) It is notable that Parker has racked up an increasing number of Honors grades in each semester that he has been at the law school. He has really begun to hit his stride.

On the strength of Parker's performance in Property, I hired him as a teaching fellow for my Property course this fall. He was terrific. As my TF, Parker engaged with Property students on classroom discussion boards, hosted weekly office hours, planned extensive introductory, midsemester, and final exam review sessions, and helped answer questions one-on-one with students during the final exam study period. He also provided written comments on my students' various small assignments submitted throughout the course, always offering helpful criticism and provocative follow-up questions in a warm, encouraging way. Parker demonstrated both excellent command of the material and special skill in helping students. His talent for working with students is not a surprise; he has extensive prior experience volunteering with young people, including as a soccer coach in the Bronx. He works extremely well with others, and I think he would be a wonderful co-clerk to nearly any personality type.

Parker excels at balancing a rigorous workload with good cheer. He had extensive experience as a litigation paralegal before coming to law school, and he has become involved in several of Harvard's most time-consuming extracurriculars. He has been a Student Attorney at the Harvard Prison Legal Assistance Project, where he worked diligently to provide legal assistance to incarcerated individuals, and his involvement in the Capital Punishment Clinic further demonstrates his commitment to providing representation to those most in need. Parker cares about both the day-to-day practice of law and also the big picture; he has been a research assistant to two different faculty members, as well as a teaching assistant in criminal law on top of his work with me in Property. I expect Parker to practice in a law firm setting in the short term—if I were a betting woman, I would expect on white-collar matters—but I also expect him to win awards for pro bono service.

I hope that it is clear, but I hold Parker in high regard. He is a self-starter who genuinely enjoys learning about the law, and I am sure you will be as glad that you hired him as I have been. If I can be of any further assistance, or provide you with any further information, please do not hesitate to contact me.

Sincerely,

Maureen E. Brady

Maureen Brady - mnicola@law.harvard.edu - (617) 384-0099

PARKER FERGUSON
700 Huron Ave., Apt. 19M, Cambridge, MA 02138 | pferguson@jd24.law.harvard.edu | 314-614-5702

WRITING SAMPLE

Drafted Summer 2022

Used with permission of the Tennessee Office of the Post-Conviction Defender.
Names and Client information have been removed to protect confidentiality.

MEMORANDUM

TO: Client Team

FROM: Parker Ferguson

DATE: 07/07/2022

RE: *McCoy* Claim

QUESTION PRESENTED

In *McCoy v. Louisiana*, the Court held that a defendant's Sixth Amendment right to the assistance of counsel is violated when counsel makes a concession of guilt at trial over their client's objection. 138 S. Ct. 1500, 1505 (2018). In the penalty phase of his capital trial, Mr. Client's trial counsel conceded the existence of an aggravating factor. Under *McCoy*, can Mr. Client prevail on a Sixth Amendment claim based on this concession?

BRIEF ANSWER

Possibly, but not likely. Mr. Client's outcome will depend on a court's reading of *McCoy* and whether counsel informed him of the decision to concede. Mr. Client's trial counsel conceded an aggravating factor, which functions as an element of the offense for purposes of sentencing. Assuming he was informed of the decision to concede, Mr. Client did not clearly object to this concession. Although he is arguably incapable of objecting due to his intellectual deficiencies, he was competent to stand trial, and thus was competent to waive his Sixth Amendment rights. Therefore, a court is not likely to conclude that his Sixth Amendment right to autonomy was violated if he was informed of the decision to concede. However, if trial counsel did not inform Mr. Client

of the decision to concede an aggravating factor, Mr. Client *may* succeed, depending on a court's analysis of the nature of the decision.

DISCUSSION

Whether *McCoy* applies in the penalty phase of a capital trial is an issue of first impression in Tennessee and the Sixth Circuit. However, in *McCoy*, the Supreme Court indicated that the focus of the analysis is the nature of the decision, not the procedural posture of the trial. Given the similarity between the decision to concede guilt or an element of the offense and the decision to concede an aggravating factor, Tennessee courts will likely hear a *McCoy* claim for a concession made during the penalty phase. However, despite the availability of a *McCoy* claim, the standard Tennessee courts apply in their analysis may defeat Mr. Client's claim. Tennessee courts have interpreted *McCoy* to require: (1) counsel conceding the defendant's guilt; and (2) over the defendant's objection. *Broadnax v. State*, No. W201801503CCAR3PC, 2019 WL 1450399 (Tenn. Crim. App. Mar. 29, 2019).[1] This memo will address each requirement in turn. Although the first requirement may represent an incorrect reading of *McCoy*, even under the correct reading, Mr. Client's claim may not satisfy the requirements, as his counsel's concession could fairly be characterized as strategic, and thus outside *McCoy*'s reach. Second, as a matter of law, Mr. Client's intellectual deficiencies do not mean he was incapable of objecting to counsel's concession. Therefore, if Mr. Client satisfies the first part of the analysis,

[1] Tennessee courts permit the citation of unpublished opinions. TENN. R. CR. A. CT. 19.

the outcome will depend on whether counsel informed Mr. Client of the decision to concede.

I. *McCoy* Likely Applies to the Penalty Phase of a Capital Trial

Whether a *McCoy* claim exists for a concession made during the penalty phase of a capital trial is a question of first impression in Tennessee and the Sixth Circuit. In *McCoy*, although the Court noted the procedural posture of the case when the concession was made, it was not determinative. Rather, the Court focused its analysis on the type of decision that trial counsel made unilaterally. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1506-09 (2018). At least one other federal court has recognized this focus on the type of decision in its analysis. *See, e.g., United States v. Roof*, 10 F.4th 314 (4th. Cir. 2021). In *United States v. Roof*, the Fourth Circuit considered whether *McCoy* prevents the presentation of mental-health mitigation during the penalty phase of a capital trial over a client's objection. *Id.* at 352-53. To answer the question, the court did not consider when the concession was made. Rather, it considered the nature of the decision, concluding that the presentation of mitigation evidence is "a classic tactical decision left to counsel … even when the client disagrees." *Id.* (quoting *United States v. Chapman*, 593 F.3d 365, 369 (4th. Cir. 2010)). In short, the nature of the decision controlled, not the phase of the trial. Thus, although Tennessee courts have not yet addressed a *McCoy* claim in the penalty phase context, they are likely to allow a claim for a concession made during the penalty phase and will focus on the nature of the decision in their analysis. For the purposes of this memorandum, I will therefore treat the procedural posture as irrelevant.

II. Trial Counsel Conceded the Equivalent of an Element of the Offense, Which May Satisfy the First Element of the *McCoy* Analysis

The nature of a decision determines whether it belongs to counsel or to the defendant. *McCoy*, 138 S. Ct. at 1512. When a defendant chooses to exercise their Sixth Amendment right to counsel, they do not surrender total control of their defense, as the Sixth Amendment "speaks of the '*assistance*' of counsel, and an assistant, however expert, is still an assistant." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)) (emphasis added). However, this does not mean that counsel must obtain their client's approval for every decision. Once retained, counsel exercises control over strategic decisions, as trial management is the lawyer's province. *Id.* (citing *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). Thus, when a defendant retains counsel, two classes of decisions exist: "decisions about how best to *achieve* a client's objectives … [and] choices about what the client's objectives in fact *are*." *Id.* (citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (noting self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")). Counsel controls strategic decisions about how to achieve an objective, while the defendant retains the ability to choose the overarching objective. *Id.*

Among the few fundamental decisions reserved to the client are whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal. *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). The focus in *McCoy* was the client's control over whether to plead guilty. The Tennessee Court of Criminal Appeals distilled from this the proposition that *McCoy* requires the concession be of the client's guilt. *Broadnax*, 2019 WL 1450399 at *6. However, this reading departs from the reasoning of *McCoy* in two respects. First, as Justice Alito observed in his dissent, at issue in *McCoy* was not a concession of guilt, but rather a concession of one of the material elements of the offense (namely the actus reus). *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting). Second, both the Court of Criminal Appeals' and Justice Alito's line of reasoning improperly focus on the object of the concession (the defendant's guilt) rather than the nature of the decision (strategic or dealing with the objective of the defense).

Mr. Client's strongest argument relies on Justice Alito's account of *McCoy*. For Justice Alito, the first requirement of the *McCoy* analysis is that counsel concede an element of the offense. *Id.* Under Tennessee law, capital trials are bifurcated. TENN. CODE ANN. § 39-13-204. Once a defendant's guilt is determined, the trial essentially begins anew to determine the penalty that will be imposed. *See State v. Teague*, 1993 WL 86929 (Tenn. Crim. App. Mar. 25, 1993), *rev'd*, 897 S.W.2d 248 (Tenn. 1995) (reversed on other grounds) (characterizing a new sentencing hearing as a "resentencing trial"). To impose a sentence of death, the jury is required to find (1) the prosecution proved the existence of one or more aggravating factors beyond a

reasonable doubt; (2) that the aggravating factors outweigh the mitigating circumstances presented by the defendant. TENN. CODE ANN. § 39-13-204. In this sense, an aggravating factor plays the same role in the penalty phase that an element of the offense plays in the guilt-innocence phase. In *McCoy*, counsel conceded the defendant had killed the victims. *McCoy*, 138 S. Ct. at 1501. But first-degree murder has both an actus reus and mens rea requirement; therefore, the concession was not of the defendant's guilt to a charge of first-degree murder, but rather a concession of the actus reus element of the crime. *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting). As in *McCoy*, Mr. Client's trial counsel did not concede his guilt. Rather, he conceded an aggravating factor. In Tennessee, to impose a sentence of death the prosecution must prove not only the existence of one or more aggravating factors, but also that the aggravating factors outweigh the mitigating circumstances. Just as counsel in *McCoy* did not concede the mens rea requirement for a first-degree murder conviction, Mr. Client's trial counsel did not concede that the aggravating factors outweighed the mitigating circumstances. Mr. Client's claim thus closely parallels the claim in *McCoy* as understood by Justice Alito.

But this reasoning does not get Mr. Client all the way. That *McCoy* dealt with the concession of an element of the offense, which is analogous to an aggravating factor in the penalty phase of a capital trial, says nothing about whether that concession is properly characterized as strategic. Indeed, Justice Alito recognized that his focus on the object of the concession left this question unanswered. *See McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting). And this is the critical question; if

the decision was strategic in nature, it falls outside of *McCoy*'s reach, even if *McCoy* is understood as dealing with the concession of an element of the offense. *McCoy*, 138 S. Ct. at 1508.

Recognizing this, the State will likely argue that the decision to concede an element of the offense, or an aggravating factor, is properly characterized as strategic. The State will likely posit there is only one objective that a defendant could plausibly pursue at the penalty phase: avoiding a sentence of death. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared."). With the objective framed as such, the State will argue the decision to concede an aggravating factor should be characterized as strategic, as it does not bear on or alter the objective of avoiding a death sentence, but rather deals with the best means of achieving that objective. *See McCoy* 138 S. Ct. at 1512 (citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

But extending the strategic-versus-objective distinction in this manner ignores the justification for the distinction in the first place. In *Gonzalez v. United States*, the Court considered whether counsel could consent to a magistrate judge presiding over jury selection without their client's consent. 553 U.S. 242 (2008). The Court concluded that such a decision did not require the client's consent, explaining that "[n]umerous choices affecting conduct of the trial … depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to

explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote." *Id.* at 249. In other words, the intersection of a decision with legal and procedural rules renders it properly in the realm of strategic decisions controlled exclusively by counsel. Compared with voir dire and the procedural rules governing jury selection implicated in *Gonzalez*, the decision to concede an aggravating factor is relatively easy to explain. The only intersection it makes with a lawyer's expertise is its relation to the burden of proof during the penalty phase, something could surely be explained to, and understood by, a defendant. Although it may not bear on the ultimate objective during the penalty phase, the decision to concede an aggravating factor is thus distinguishable from those decisions traditionally given to the unilateral control of counsel.

Regardless of the back-and-forth regarding the nature of the decision to concede an aggravating factor, a court may deny Mr. Client relief on the grounds that he did not clearly object to his counsel's concession.

III. Mr. Client Did Not Object to Counsel's Concession

Even where counsel concedes the defendant's guilt during the guilt-innocence phase of a capital trial, a defendant must have intransigently objected to counsel's concession to bring a Sixth Amendment claim under *McCoy* for a violation of their right to autonomy in their defense. *See, e.g., McCoy*, 138 S. Ct. at 1509 (granting relief where defendant opposed concession of guilt at every opportunity); *Nixon*, 543 U.S. at 186 (denying relief where defendant did nothing affirmative or negative when

presented with concession strategy); *Broadnax*, 2019 WL 1450399 at *6 (denying relief where nothing in the record demonstrated that defendant made an objection to the defense strategy). In fact, some courts have interpreted *McCoy* to require an objection be made on the record to sustain a claim. *See, e.g., In re Smith*, 49 Cal. App. 5th 377 (Cal. Ct. App. 2020) ("the record must show . . . that the defendant's plain objective is to maintain his innocence and pursue an acquittal") (citing *People v. Eddy*, 33 Cal. App. 5th 472, 482-83 (Cal. Ct. App. 2019); *Epperson v.* Commonwealth, 645 S.W.3d 405, 408 (Ky. 2021) ("The requirement of an objection on the record is only logical. Should an attorney concede guilt to the charged crime, the trial court can only presume that such a concession is part of a legitimate and agreed upon strategy absent an objection from the defendant himself. It is absurd to suggest otherwise, as that would force the trial court to divine whether the defendant does in fact have an objection to a concession of guilt").

In *Nixon*, counsel planned to functionally concede Nixon's guilt during trial to improve their chances of avoiding a death sentence during the penalty phase. *Nixon*, 543 U.S. at 181. Counsel presented Nixon with this strategy at least three times, and each time Nixon responded neither affirmatively or negatively. *Id.* at 181, 192. Counsel then proceeded with the strategy, and Nixon was found guilty and sentenced to death. *Id.* at 184. Nixon appealed, arguing that a concession of guilt requires an affirmative, explicit acceptance. *Id.* at 185. The Court rejected this argument, holding that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic

choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.* at 192. On the other hand, the *McCoy* Court repeatedly emphasized the defendant's intransigent objections to counsel's strategy, distinguishing the case from *Nixon*, and granted relief. *McCoy*, 138 S. Ct. at 1509.

Mr. Client's situation closely parallels *Nixon*. As in *Nixon*, nothing indicates that Mr. Client objected to counsel's decision to concede an aggravating circumstance. That Mr. Client's intellectual deficiency makes it difficult for him to process verbal communication does not change the outcome. The competency standard for waiving a right, such as the right to plead guilty or be represented by counsel, is the same as the competency standard for standing trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" *Godinez v. Moran*, 509 U.S. 389, 389 (1993) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

The competency standard for standing trial is easily satisfied. In *Stanley v. Lazaroff*, the Sixth Circuit reviewed an Ohio court's determination that defendant was competent to stand trial. 82 F. App'x 407 (6th Cir. 2003). Despite the defendant's prelingual deafness and lower level of intellectual functioning, including an inability to read or write, the court found the conclusion that defendant was competent to stand trial sufficiently supported by the record. *Id.* at 416. In reaching their conclusion, the court observed that expert testimony supported a finding that defendant "knew he was accused of killing a woman, understood that he could be punished, was able to relate past events, and was able to understand testimony." *Id.*

Moreover, the use of interpreters enabled the defendant to understand the proceedings, consult with his counsel, and assist in his defense. *Id.* at 417. In other words, a near complete lack of communicative skills did not render the defendant per se incompetent to stand trial.

Here, Mr. Client was deemed competent to stand trial, and thus a court is likely to find him competent to waive his Sixth Amendment right to autonomy in his defense. Although Mr. Client struggles to understand verbal communications, his deficiency likely does not rise to the level present in *Stanley*, and so does not per se render him incompetent to stand trial and/or waive his rights. Furthermore, like the interpreters in *Stanley*, there were means available to overcome Mr. Client's deficiency, such as communicating with Mr. Client in writing. Assuming counsel adequately informed Mr. Client of his plan to concede the aggravating factor, Mr. Client's failure to object likely dooms his claim under *McCoy* and *Nixon*.

If, however, counsel did not inform Mr. Client of his plan to concede the aggravating factor or failed to use an interpretive tool to overcome Mr. Client's intellectual deficiency, a court will be more likely to grant relief. As the Court explained in *Nixon*, an attorney undoubtedly has a duty to consult with their client regarding important decisions, including questions of overarching defense strategy. *Nixon*, 543 U.S. at 186 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Whether an attorney's failure to consult with their client triggers a *McCoy* analysis, or the typical *Strickland* ineffective assistance of counsel analysis, again turns on the nature of the decision.

As discussed above, if *McCoy* is read as holding a concession of the element of an offense to be structural error, then a court may grant Mr. Client relief on the grounds that his counsel's failure to consult him regarding the decision to concede what was essentially an element of the offense constitutes structural error. Mr. Client would have a strong argument that if counsel's failure to heed his objections would be sufficient for relief under *McCoy*, then surely a failure to give him an opportunity to object should also suffice. In both scenarios, the outcome is the same: his voice was ignored, and he was denied the ability to exercise his Sixth Amendment right to autonomy in his defense. On the other hand, if the decision to concede an aggravating factor is distinct from a concession of guilt, counsel's failure to consult Mr. Client would be analyzed under *Strickland*, which is outside the scope of this memorandum.

CONCLUSION

Whether Mr. Client succeeds on a *McCoy* claim for his trial counsel's concession of an aggravating factor during the penalty phase of his capital trial depends on how a court reads *McCoy*, and whether Mr. Client was informed of the decision to concede. Tennessee courts have interpreted *McCoy* to require that the concession be of defendant's guilt. Mr. Client's trial counsel did not concede his guilt. Although under another reading of *McCoy* the concession of an aggravating factor is analogous to the concession of an element of the offense, and distinguishable from decisions typically surrendered to the unilateral control of counsel, this argument may not save Mr. Client's claim. If trial counsel informed Mr. Client of the decision to concede, Mr. Client failed to object and a court is likely to deny relief, notwithstanding his

intellectual deficiencies. However, if trial counsel did not inform Mr. Client of the decision to concede, Mr. Client *may* obtain relief *if* a court reads *McCoy* as applying the concession of an element of the offense and accepts Mr. Client's argument that the concession of an aggravating factor is sufficiently analogous.

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WRITING SAMPLE

Drafted Spring 2023

Used with permission of Gretchen Sween.

Names and certain information have been removed to protect confidentiality.

The sample is an excerpt of a longer memorandum. I have removed portions discussing the False Claims Act and statutorily created rights. What remains is a discussion of § 1983 and the Fourth Amendment. Should you be interested in reading the entire memorandum, please let me know and I would be happy to provide you with a copy.

MEMORANDUM

TO: Gretchen Sween

FROM: Parker Ferguson

RE: Mr. Client SSI Benefits Theft Remedies

DATE: 03/15/2023

Question

When a prison guard withdraws SSI benefits from a death row inmate's account without authorization, does the law provide a viable remedy?

Brief Answer

Likely yes. Because the money was already taken, and Mr. Client is under a sentence of death, there must be a monetary incentive to both Mr. Client and his attorneys for the remedy to be viable. Due to this necessity, criminal reporting is not a viable option. Because it provides for the award of attorney's fees, a suit under § 1983 and a *qui tam* action under the False Claims Act are promising options. However, because the guards did not mislead the government, Mr. Client likely cannot recover under the False Claims Act. Mr. Client therefore has the greatest chance for success bringing a § 1983 claim for a violation of his Fourth Amendment right to be free from unreasonable seizure.

Facts

In early 2009, Mr. Client was battling the three-headed monster of mental illness, homelessness, and addiction. But he did not enter the battle unarmed. Pursuant to Title XVI of the Social Security Act, Mr. Client received Supplemental Security Income ("SSI") benefits which provided him with a monthly check of roughly $700.

Deemed unfit to care for his own basic needs, Mr. Client was required to designate a payee to receive the benefits on his behalf and he chose his sister and niece. For the next nine months, his sister and niece stole the benefits to which he was entitled, first taking the lump-sum payment he received for his application period, and then requiring him to pay them in exchange for their service of cashing his checks. When he explained this to the SSI administrators, his sister and niece quickly rejoined that Mr. Client was simply crazy, and no such theft was occurring. To avoid this injustice, Mr. Client compiled receipts detailing his monthly expenditures and contacted the SSI office to demonstrate not only that the theft was in fact occurring, but also that he no longer needed a payee to receive the benefits on his behalf. The administrators agreed and began issuing the checks directly to Mr. Client.

Mr. Client quickly realized that his addiction made it difficult to avoid the allure of the dealers that reached for his cash-filled hands when he left the ATM. And so, in early 2010, Mr. Client arranged for his benefits to be placed directly into a bank account under his name via direct deposit.

On November 4, 2010, Mr. Client was arrested and charged with capital murder. At the time of his arrest, Mr. Client was carrying a wallet which contained his debit card, pin number, and bank account information. Following his arrest, his wallet and its contents were deposited in the property room of the Harris County Jail. They remained there for nearly ten years while Mr. Client awaited trial. All the while, his SSI benefits continued to be deposited and the balance of his account steadily rose.

Following his conviction and the imposition of a death sentence, Mr. Client was transferred to the custody of the Texas Department of Criminal Justice ("TDCJ") and sent to the Polunsky Unit to await his execution. A yellow manilla envelope containing his wallet and its contents followed him. During intake at Polunsky, Mr. Client informed Major [Guard] that the wallet contained his debit card, pin number, and account information, and asked that any funds be transferred to his prison account at Polunsky. Major [Guard] took Mr. Client's request under consideration. Some twenty minutes later, together with the Warden, Major [Guard] informed Mr. Client they had found the debit card, pin number, and account information in his wallet and would effectuate the transfer as requested. Shortly thereafter, as Mr. Client was escorted to his cell, Sergeant [Guard] commented to another officer that "$76,000 is too much money for one person to have." Notably, $76,000 is roughly the amount that should have accrued in Mr. Client's account. A few days later, when Mr. Client inquired about the status of the funds transfer, the major informed him that there was no debit card in the wallet they received, and that there was no money in Mr. Client's accounts. Much like before with his aunt and sister, the major told Mr. Client he was crazy as refutation of the notion that the money had been stolen.

Mr. Client continues to live under a sentence of death at the Polunsky Unit. Like all death row inmates in Texas, he spends the majority of his time in solitude. A modest reprieve from this confinement is the availability of goods, such as radios, fans and books, for purchase through commissary. Deprived of his SSI benefits, Mr. Client

seeks a remedy which provides him money to be used for commissary; a remedy which affords him solace in the bleak conditions in which he exists.

[Excerpted Sections]

II. § 1983 Claim

[Excerpted Section]

To state a claim under 42 U.S.C. § 1983, the plaintiff must allege the violation of a right secured by the Constitution or laws of the United States and that the violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48-49 (1988). Attorney's fees are plainly available to the prevailing party in a § 1983 suit. 42 U.S.C. § 1988(b); *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980).

A. The guards violated a right secured by the Constitution and laws of the United States.

It is well established that the § 1983 remedy protects rights secured both by the federal constitution and federal statutes. *Thiboutot*, 448 U.S. at 3-4; *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002). Mr. Client can claim both a violation of his Fourth Amendment right to be free from unreasonable seizure, as well as a deprivation of his statutorily created rights under the Social Security Act. He cannot, however, state a claim under § 1983 for a violation of his right to due process because TDCJ has provided a grievance process, 37 Tex. Admin. Code § 163.39, of which Mr. Client has availed himself, to litigate the deprivation of his property. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

i. Fourth Amendment

Mr. Client had a property interest in the money in his account, placing it squarely within the protection of the Fourth Amendment. The Fourth Amendment guarantees, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures." U.S. Const. amend. IV. It draws no distinction among "persons, houses, papers, and effects" in safeguarding against unreasonable seizures. *See United States v. Rabinowitz*, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting).

The guards seized Mr. Client's property when they withdrew his money without his consent. A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). But, in *Arizona v. Hicks*, the Court held that the mere recording of serial numbers did not constitute a seizure within the meaning of the Fourth Amendment. 480 U.S. 321, 324 (1987). Here, unlike in *Hicks*, the guards did not merely record or administer Mr. Client's money. Rather, their "interference" was a complete and total deprivation of Mr. Client's property, easily meeting the "meaningful" standard necessary to constitute a seizure within the meaning of the Fourth Amendment.

The guards' seizure of Mr. Client's monetary property offended the Fourth Amendment. The ultimate touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Typically, this requires obtaining a judicial warrant. *Riley v. California*, 573 U.S. 373, 382 (2014). Seizures affected

without warrant are per se unreasonable (and thus violate the Fourth Amendment), and can only be saved if they occurred pursuant to a few specifically-established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Generally, these exceptions fall within three doctrinal categories: (1) special needs; (2) exigent circumstances; and (3) diminished expectation of privacy and minimal intrusion. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37-41 (2000) (special needs); *Lange v. California*, 141 S.Ct. 2011, 2017 (2021) (exigent circumstances); *Maryland v. King*, 569 U.S. 435, 463-64 (2013) (diminished expectation and minimal intrusion).

The seizure of Mr. Client's SSI benefits was not justified by the presence of an exigent circumstance. Exigent circumstances sufficient to justify a warrantless seizure generally take one of three forms: hot pursuit of a fleeing felon, destruction of evidence, and public safety. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 298-299 (1967) (hot pursuit); *Schmerber v. California*, 383 U.S. 757, 770-771 (1966) (destruction of evidence); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (public safety). Mr. Client was not fleeing. There was no risk of evidence destruction. He was not a public safety threat. To the contrary, he was incarcerated on death row under constant surveillance. More fundamentally yet, the guards lacked probable cause that a crime had been committed. *See Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) (the exigent circumstances exception does not do away with the probable cause requirement); *United States v. Brinegar*, 338 U.S. 160, 175 (1949) ("Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are]sufficient in themselves to warrant a man

of reasonable caution in the belief that an offense has been or is being committed") (citation and internal quotation marks omitted). The seizure therefore was not justified under the exigent circumstances exception to the warrant requirement.

The seizure of Mr. Client's property was also not justified by reference to any special need. The Court's special needs jurisprudence deals in scenarios where law enforcement conducts programmatic searches and seizures with mechanical application for non-law enforcement purposes. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37-41 (2000) (roadblock for purpose of narcotics interdiction); *Delaware v. Prouse*, 440 U.S. 648, 651 (1979) (roadblock for license and vehicle registration check). The guard's seizure of Mr. Client's property was not part of a broader program. Nor was it for the purpose of identifying Mr. Client. *See Maryland v. King*, 569 U.S. 435, 463-64 (2013) (suggesting extension of special needs exception to seizures conducted without probable cause when primary purpose is identification of detainee). The special needs exception is plainly inapposite.

The diminished expectation and minimal intrusion issue is a closer call. The guards will likely advance two related arguments under this doctrinal umbrella. First, that the Fourth Amendment is per se inapplicable because the guards did not interfere with any reasonable expectation of privacy, and second, that their seizure did not offend the Fourth Amendment because Mr. Client's incarceration diminishes the protection afforded him and their intrusion was minimal. Both arguments likely fail.

That Mr. Client did not have a reasonable expectation of privacy does not defeat his Fourth Amendment claim. Although the Court has emphasized that "the Fourth

Amendment protects people, not places," it has not abandoned the property-based approach to the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 406 (2012) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). In fact, in *Sodal v. Cook County*, the Court unanimously rejected the argument that a seizure does not fall within the scope of the Fourth Amendment simply because law enforcement had not invaded the individual's privacy. 506 U.S. 56, 62 (1992). So too here. That Mr. Client cannot claim an invasion of any privacy interest does not make the guard's conduct any less a seizure.

Mr. Client's incarceration also does not defeat his Fourth Amendment claim. Although prisoners have a diminished expectation of *privacy* while incarcerated, their *property* interests are not diminished to the same extent. The Court recognized as much in *Hudson v. Palmer*. 468 U.S. 517 (1984). Deploying the *Katz* reasonable expectation of privacy test, the *Hudson* Court concluded that the Fourth Amendment has no applicability to a prison cell. *Id.* at 536. Although a prisoner may have a subjective expectation of privacy over their cell, society is not prepared to recognize this expectation as legitimate given its weighty interest in the security of its penal institutions. *Id.* at 527. In other words, "a right of privacy in the traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and institutional order." *Id.* However, the Court held open the possibility of a due process remedy for the destruction of property by prison officials. *Id.* at 533. This implies the prisoner maintains at least *some* property interests while incarcerated. And this

makes sense. Society's interest in the security of its penal institutions cannot carte blanche justify every deprivation of a prisoner's property, particularly their monetary property. In fact, prisons themselves seem to recognize as much given the widespread availability of prison bank accounts and commissary. Insofar as the seizure of Mr. Client's property cannot be justified by some reference to institutional security, it was unreasonable and offended the Fourth Amendment. *See id.* at 539 (O'Connor, J., concurring) ("nonprivacy interests protected by the Fourth Amendment do not extend beyond the right against *unreasonable* dispossessions") (emphasis added). *Cf.*, *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (prisoners retain those First Amendment rights of speech "not inconsistent with [their] status as … prisoner[s] or with the legitimate penological objectives of the corrections system.").

The Court's reasoning in *Maryland v. King* is not to the contrary. 569 U.S. 435 (2013). There, the Court held that the buccal swab of an inmate's check without individualized suspicion of a crime did not offend the Fourth Amendment due to its minimally intrusive nature and the inmate's diminished expectation of privacy. *King*, 569 U.S. at 463-464. A crucial factor in the Court's analysis was the magnitude of the intrusion. *Id.* As discussed above, although Mr. Client may have a diminished expectation of privacy, his property interests are not necessarily diminished to the same extent. Moreover, unlike in *King*, the guard's seizure of Mr. Client's property was not minimal. More than a brief insertion of a cotton swab into the mouth, the guards stole $76,000 from Mr. Client while he awaits his execution on Death Row.

The conclusion that the guards' seizure of Mr. Client's property was unreasonable is therefore consistent with the Court's existing Fourth Amendment jurisprudence.

Based on the foregoing, a court would likely find the guards violated Mr. Client's Fourth Amendment right to be free from unreasonable seizures when they seized his property without warrant.

[Excerpted Section]

B. The guards were acting under the color of state law.

Generally, state employment is sufficient to render a defendant a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982). But the defendant need not be acting pursuant to established policy to render them a state actor; one acts under color of state law when they exercise power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). In other words, "under the color of state law" encompasses both instances where those carrying a badge of authority of a State represent it in some capacity in accordance with their authority, and where they misuse that authority. *Monroe v. Pape*, 365 U.S. 167, 172 (1961). An official's abuse of their position puts them squarely within the term's meaning. *Id.* (citing *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

The guards were acting under color of state law when they withdrew money from Mr. Client's account. It is undisputed that the guards were employees of the state. Moreover, when they accessed Mr. Client's account and withdrew money, they were

exercising power they possessed by virtue of state law. But for their position and authority as prison guards, they would not have had access to Mr. Client's account information. It matters not that no state policy authorized their conduct; they exercised power they possessed by virtue of state law and their conduct was made possible only because they were clothed with the authority of state law. *Classic*, 313 U.S at 299. Therefore, for purposes of § 1983, the guards were acting under the color of state law.

[Excerpted Section]

C. The guards may have qualified immunity.

The guards' primary defense to a § 1983 claim will be that they are entitled to qualified immunity from civil suit for their actions. They are likely entitled to qualified immunity with respect to Mr. Client's claim for a deprivation of his statutory rights. They are likely *not* entitled to qualified immunity with respect to his Fourth Amendment claim. This section will address each claim in turn.

Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In the Fifth Circuit, the qualified immunity analysis proceeds in two steps. First, the court asks whether the facts that a plaintiff has alleged make out a violation of a statutory or constitutional right. Second, the court asks whether the right at issue was clearly established at the time of the defendant's alleged misconduct. *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017).

That Mr. Client's Fourth Amendment and statutory rights were likely violated was discussed above in Section II.A.i. Accordingly, this section focuses on whether the guards "violated clearly established [rights] of which a reasonable person would have known." *Samples v. Vadzemnieks*, 900 F.3d 655, 662 (5th Cir. 2018) (quotations, citations, and ellipses omitted).

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). In their analysis, courts are "not to define clearly established law at a high level of generality." *Id.* at 742. Rather, the question is whether the violative nature of particular conduct is clearly established. *Id.* In the Fourth Amendment context, the inquiry "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time [the action] was taken." *Pearson*, 555 U.S. at 244-45. Given the fact-intensive nature of this reasonableness inquiry, specificity in defining the clearly established law is particularly important. *Mullenix*, 577 U.S. at 12 (citation omitted). But a case directly on point is not required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). There are rare cases in which the constitutional right at issue is defined by a standard that is so obvious that qualified immunity is inapplicable even without a case directly on point. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (recognizing that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

The Fifth Circuit has yet to decide a case directly on point with respect to Mr. Client's Fourth Amendment claim.[1] But this is not dispositive. *Ashcroft*, 563 U.S. at 741. That is because the general rules established by the Supreme Court's Fourth Amendment jurisprudence apply with obvious clarity to the conduct in question. *Hope*, 536 U.S. at 740-741. The Supreme Court has clearly established that a seizure violates the Fourth Amendment when effectuated without a warrant, subject to a few specifically-established and well-delineated exceptions. *Katz*, 389 U.S. at 357. As discussed, the guards cannot plausibly point to any special need or exigent circumstance to justify their seizure of Mr. Client's property absent a warrant. Although the argument regarding minimal intrusion and diminished expectation of privacy is a closer call, the nature of the seizure suggests that, under *King*, they should reasonably have known that they were not authorized to seize Mr. Client's property. "[A] reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Here, the nature of the intrusion authorized under *King* is apparently distinct from the guards' conduct. To say that a guard could reasonably believe that a complete and total deprivation of property is analogous to a buccal swab for DNA taxes the credulity of the credulous. *King*, 569 U.S. at 463-64, 466 (Scalia, J., dissenting). Mr. Client has a strong argument that his case is the rare one in which the right at issue is so obviously defined that qualified immunity is inapplicable even without a case directly on point. *Hope*, 536 U.S. at 740-41; *see also*

[1] The case most factually analogous to Mr. Client's is *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019). There, the court concluded that officers were entitled to qualified immunity for the theft of property. However, *Jessop* is distinguishable as the officers had initially seized the property pursuant to a valid warrant.

Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (particularly egregious facts can make it such that any reasonable officer should be aware of the Constitutional violation). The guards stole Mr. Client's money — it is hard to imagine conduct that is more clearly prohibited both under the Constitution and any reasonable officer's intuition about what the Constitution prohibits.

[Excerpted Section]

Conclusion

Mr. Client likely has a viable legal remedy for the theft of his SSI benefits. Although he could make out a novel *qui tam* claim under the False Claims Act, a court is likely to conclude the guards' actions do not give rise to liability as their material misrepresentation of their identity did not mislead the government. However, under 42 U.S.C. § 1983, Mr. Client has a strong claim for a violation of both his statutory and Constitutional rights. Given the likelihood of a successful qualified immunity defense to his claim for a violation of his statutorily created rights, Mr. Client's most viable option is a claim for a violation of his Fourth Amendment right to be free from unreasonable seizure. The success of this claim ultimately turns on whether a court is willing to recognize that the brazen actions of the guards violated clearly established Fourth Amendment law as announced by the Supreme Court.

Applicant Details

First Name	**Emily**
Middle Initial	**K**
Last Name	**Fox**
Citizenship Status	**U. S. Citizen**
Email Address	**emilykfox@wustl.edu**
Address	**Address** Street **1800 S. Brentwood Blvd., Apt. 1127** City **St. Louis** State/Territory **Missouri** Zip **63144** Country **United States**
Contact Phone Number	**8058278282**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**January 2021**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 24, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Magarian, Gregory
gpmagarian@wustl.edu
(314) 935- 3394

Epps, Daniel
epps@wustl.edu
(314) 935-3532

Sachs, Rachel
rsachs@wustl.edu
(314) 935-8557

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EMILY FOX
1800 S. Brentwood Blvd. Apt. 1127, Brentwood, MO 63144
emilykfox@wustl.edu | 805-827-8282

June 27, 2023

The Honorable Stephanie Davis
U.S. Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year law student at Washington University School of Law, where I am ranked seventh in my class, an articles editor of the *Washington University Law Review*, and a member of the National Moot Court Team. I am writing to express my interest in a clerkship in your chambers beginning in 2024.

I believe my legal coursework, together with my background in research and textual analysis, will enable me to provide high-quality work efficiently. As the only primary Jewish Studies major in the Class of 2021 at Washington University, I was challenged by my professors to understand diverse viewpoints, have deep textual conversations one-on-one, and conduct in-depth research on niche topics. My position as a summer associate at Bryan Cave Leighton Paisner requires me to conduct various legal research and writing projects efficiently and effectively communicate my work products to assigning associates and partners. In addition, since ninth grade, my time as a student-athlete has taught me how to excel with a busy schedule from six in the morning until eight in the evening each day. I believe each of these skills has prepared me to succeed as a law clerk in your chambers.

Included with this application please find my résumé, undergraduate and law school transcript, and two writing samples. The first writing sample is an adaptation from the topic of an appellate brief that I completed during my Legal Practice II: Advocacy course. The second writing sample is the note I submitted for publication consideration at the *Washington University Law Review*. The letters of recommendation have been submitted by the following individuals.

Prof. Daniel Epps	Prof. Greg Magarian	Prof. Rachel Sachs
WashULaw	WashULaw	WashULaw
epps@wustl.edu	gpmagarian@wustl.edu	rsachs@wustl.edu
(314)-935-3532	(314)-935-3394	(314)-935-8557

Thank you in advance for your time and consideration. Please do not hesitate to contact me if I can provide you with additional information. I would greatly appreciate any opportunity to interview with you.

Sincerely,

Emily Fox

EMILY FOX

1800 S. Brentwood Blvd. Apt 1127, Brentwood, MO 63144
emilykfox@wustl.edu | 805-827-8282

EDUCATION

Washington University School of Law St. Louis, MO
Juris Doctor Candidate | GPA: 3.94 | Rank: 7/293 May 2024

Honors & Activities:
Dean's Fellow
Club Swimming, National Team Member
Washington University Law Review, vol. 101, Articles Editor
Graduate Professional Council, VP Academic & Professional Development
Sports and Entertainment Law Society
Honor Scholar Award Recipient
National Moot Court Team, Member: 2023 William B. Spong Competition Runner-up, Best Respondent's Brief Award

Washington University in St. Louis St. Louis, MO
Bachelor of Arts in Jewish, Islamic, and Middle Eastern Studies | GPA: 3.89 Jan. 2021
Honors Thesis: *Cultural Symbiosis: How the Jews of Colonial New York Embraced the Early American Spirit*

Honors & Activities:
Dean's List (6 Semesters)
Theta Alpha Kappa
Club Swimming*, Coach, Treasurer*
Konig Prize in Law & History
Varsity Swimming
Club Rowing, *Recruitment Chair*

PUBLICATIONS

Fairness for All? The Implications of Adopting a Third-Gender Category in Elite Sports, 101 WASH. U. L. REV __ (2023) (forthcoming).

EXPERIENCE

United States Court of Appeals, Eighth Circuit St. Louis, MO
Judicial Extern for the Honorable Judge Raymond Gruender Aug. 2022 – Dec. 2022

- Assist law clerks in various tasks, including evaluating petitions for rehearing and researching legal questions for bench memos and court opinions.
- Wrote first draft of various opinions on matters including sentencing, contract disputes, and Rule 11 sanctions.

Bryan Cave Leighton Paisner, LLP St. Louis, MO
Summer Associate May 2022 – Aug. 2022, *offer to return summer 2023*

- Conducted legal research and writing for various transactional and litigation projects primarily in the anti-doping sports group and appellate litigation groups.
- Gained in-house experience with client Peabody Energy.

Washington University in St. Louis St. Louis, MO
Research Assistant for Professor Greg Magarian May 2023 – Aug. 2023

- Compile legal research for Prof. Magarian's upcoming projects focusing on the Second Amendment from a First Amendment perspective.

Teaching and Research Assistant for Professor Lee Epstein Jan. 2021 – May 2022

- Wrote an introductory lecture on Justice Sonia Sotomayor before she spoke to Prof. Epstein's undergraduate course: Topics in Politics: Free Speech on Campus.
- Collected a database of state supreme court justices' information to be used as the basis for a study on the impact of diversity in the court system.
- Assisted students in understanding course materials, developed questions for exams, and graded exams for the undergraduate course: Constitutional Law: Institutional Powers and Restraints.

Hillel at Washington University in St. Louis St. Louis, MO
Development Intern Feb. – Aug. 2022

- Compiled alumni records, coordinated fundraising efforts, and assisted with student engagement events.

COMMUNITY ENGAGEMENT & INTERESTS

Washington University in St. Louis Varsity Swim Team, Assistant Coach | Yoga | Alternative Rock Music

Washington University in St. Louis

Office of the University Registrar

Record Of: **Fox, Emily Katz**
Student ID Number: 456708

Transcript Issued 06/09/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Degrees Awarded:

A.B. MAJOR IN JEWISH, ISLAMIC & NEAR EAST STUDIES — JAN 10, 2021
GRADUATED WITH HONORS: CUM LAUDE — JAN 10, 2021
MINOR IN LEGAL STUDIES — JAN 10, 2021
MINOR IN RELIGION AND POLITICS — JAN 10, 2021

Current Programs Of Study:

JURIS DOCTOR

Fall Semester 2017

INTRODUCTION TO MICROECONOMICS	ECON	L11 1011	3.0	CR#
FIRST YEAR MODERN HEBREW	HBRW	L74 1011	3.0	A+
AN INTRODUCTION TO LOGIC AND CRITICAL ANALYSIS	LW ST	L84 105G	3.0	A-
CLASSICAL TO RENAISSANCE LITERATURE: TEXT AND TRADITION	IPH	L93 201C	3.0	A-
EARLY POLITICAL THOUGHT: TEXT AND TRADITION	IPH	L93 203C	3.0	B+

Enrolled Units 15.0 Semester GPA 3.68 Cumulative Units 15.0 Cumulative GPA 3.68

Spring Semester 2018

OUT OF THE SHTETL: JEWISH LIFE IN CENTRAL AND EASTERN EUROPE IN THE 19TH AND 20TH CENTURIES	HISTORY	L22 3350	3.0	A-
INTRODUCTION TO CULTURAL ANTHROPOLOGY	ANTHRO	L48 160B	3.0	B
ZIONISM	RELPOL	L57 250	3.0	B+
COLLEGE WRITING 1	CWP	L59 100	3.0	A
FIRST YEAR MODERN HEBREW	HBRW	L74 1012	3.0	A+

Enrolled Units 15.0 Semester GPA 3.60 Cumulative Units 30.0 Cumulative GPA 3.63

Fall Semester 2018

INTRODUCTION TO HUMAN EVOLUTION	ANTHRO	L48 150A	3.0	A-
COGNITION AND CULTURE	ANTHRO	L48 3383	3.0	A
THE FBI AND RELIGION	RELPOL	L57 355	3.0	A+
SECOND YEAR MODERN HEBREW	JINE	L75 201D	3.0	A+
BIBLICAL LAW AND THE ORIGINS OF WESTERN JUSTICE	JINE	L75 3012	3.0	A

Enrolled Units 15.0 Semester GPA 3.94 Cumulative Units 45.0 Cumulative GPA 3.74

Spring Semester 2019

RELIGION AND POLITICS IN AMERICAN HISTORY	RE ST	L23 225	3.0	A
SECOND YEAR MODERN HEBREW	JINE	L75 202D	3.0	A+
INTRODUCTION TO JEWISH CIVILIZATION: HISTORY AND IDENTITY	JINE	L75 208F	3.0	A
BECOMING "MODERN": EMANCIPATION, ANTISEMITISM, AND NATIONALISM IN MODERN JEWISH HISTORY	JINE	L75 335C	3.0	A+
IN THE BEGINNING: CREATION MYTHS OF THE BIBLICAL WORLD	JINE	L75 375W	3.0	A

Enrolled Units 15.0 Semester GPA 4.00 Cumulative Units 60.0 Cumulative GPA 3.81

Fall Semester 2019

SLAVERY, SOVEREIGNTY, SECURITY: AMERICAN RELIGIONS AND THE PROBLEM OF FREEDOM	RE ST	L23 3650	3.0	A+

Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar

Record Of: **Fox, Emily Katz**
Student ID Number: 456708

Fall Semester 2019

JINES CAPSTONE SEMINAR: CONVIVENCIA OR RECONQUISTA? MUSLIMS, JEWS, AND CHRISTIANS IN MEDIEVAL IBERIA	RE ST	L23 4002	3.0	A
INTRODUCTION TO DIRECTED RESEARCH	ANTHRO	L48 290	1.0	A
PURITANS AND REVOLUTIONARIES: RELIGION AND THE MAKING OF AMERICA	RELPOL	L57 235	3.0	A
INTRODUCTION TO BIBLICAL HEBREW	JIMES	L75 3841	3.0	A
TOPICS IN JEWISH HISTORY: JEWS IN NORTH AFRICA & THE MIDDLE EAST (19TH-20TH CENTURY)	JIMES	L75 386	3.0	A

Enrolled Units 16.0 Semester GPA 4.00 Cumulative Units 76.0 Cumulative GPA 3.85

Spring Semester 2020

TOPICS IN PHYSICAL EDUCATION: VARSITY SPORTS	P.E.	L28 220	1.0	CR#
SYMBOLIC LOGIC	PHIL	L30 301G	3.0	A
INTRODUCTION TO DIRECTED RESEARCH	ANTHRO	L48 290	1.0	A
INTRODUCTION TO ISLAMIC CIVILIZATION	JIMES	L75 210C	3.0	A
TOPICS IN BIBLICAL HEBREW TEXTS: JEREMIAH	JIMES	L75 385D	3.0	A
ARGUMENTATION	LW ST	L84 312	3.0	A
CONSTITUTIONAL LAW: INSTITUTIONAL POWERS AND CONSTRAINTS	LW ST	L84 3431	3.0	A+

Enrolled Units 17.0 Semester GPA 4.00 Cumulative Units 105.0 Cumulative GPA 3.88

Fall Semester 2020

LEGAL CONFLICT IN MODERN AMERICAN SOCIETY	POL SCI	L32 3507	3.0	A-
ISLAM, GENDER, SEXUALITY	JIMES	L75 362A	3.0	A
STUDY FOR HONORS IN JEWISH, ISLAMIC, AND NEAR EASTERN STUDIES	JIMES	L75 499	3.0	A
TOPICS IN COMPOSITION: WRITING AND THE LAW	LW ST	L84 314W	3.0	A
THE DEVELOPMENT OF THE AMERICAN CONSTITUTION	LW ST	L84 3255	3.0	A

Enrolled Units 15.0 Semester GPA 3.94 Cumulative Units 120.0 Cumulative GPA 3.89

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (LEWIS)	LAW	W74 500F	2.0	A
CONTRACTS (P. SMITH)	LAW	W74 501A	4.0	A
PROPERTY (SACHS)	LAW	W74 507W	4.0	A+
TORTS (TAMANAHA)	LAW	W74 515D	4.0	A+

Enrolled Units 14.0 Semester GPA 3.94 Cumulative Units 14.0 Cumulative GPA 3.94

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (LEWIS)	LAW	W74 500G	2.0	A
CRIMINAL LAW (EPPS)	LAW	W74 502Q	4.0	A+
NEGOTIATION (TOKARZ/SHIELDS)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (P. KIM)	LAW	W74 506G	4.0	A
CONSTITUTIONAL LAW I (MAGARIAN)	LAW	W74 520L	4.0	A

Enrolled Units 16.0 Semester GPA 3.91 Cumulative Units 30.0 Cumulative GPA 3.93

Keri A. Disch, University Registrar

Washington University in St. Louis

Office of the University Registrar

Record Of: **Fox, Emily Katz**
Student ID Number: 456708

Spring Semester 2022

Fall Semester 2022

LEGAL ISSUES IN SPORTS	MGT	B53 460J	1.5	A
CORPORATIONS (FRANKENREITER)	LAW	W74 538W	3.0	A-
LEGISLATION (MAGARIAN)	LAW	W74 601A	3.0	A
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
FOREIGN RELATIONS LAW OF THE UNITED STATES (WATERS)	LAW	W74 725B	3.0	A+
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.5 Semester GPA 3.92 Cumulative Units 44.5 Cumulative GPA 3.93

Spring Semester 2023

CONFLICT OF LAWS (WATERS)	LAW	W74 536B	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0	A+
EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A
RELIGION AND THE CONSTITUTION (INAZU)	LAW	W74 724F	3.0	A+
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.0 Semester GPA 3.97 Cumulative Units 58.5 Cumulative GPA 3.94

Remarks

FL2017 FROM: ADVANCED PLACEMENT WESTERN CIVILIZATION	0 UNITS
FL2017 FROM: ADVANCED PLACEMENT FREEDOM, CITIZENSHIP AND THE MAKING OF AMERICAN LIFE	0 UNITS
SP2018 FROM: ADVANCED PLACEMENT ENGLISH COMPOSITION ELECTIVE	0 UNITS
SP2020 FROM: BY PROFICIENCY POLITICAL SCIENCE ELECTIVE	0 UNITS
SP2020 FROM: TOTAL CREDIT GRANTED BY PREMATRICULATION UNITS	12.0 UNITS

SP2020 SPECIAL NOTE: GIVEN THE COVID-19 DISRUPTION, DEAN'S LIST WAS NOT AWARDED DURING SPRING 2020.
SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.
FL2022 FROM: OLIN SCHOOL OF BUSINESS LAW SCHOOL ELECTIVE 1.5 UNITS

Distinctions, Prizes and Awards

SP2018 DEAN'S LIST
FL2018 DEAN'S LIST
SP2019 DEAN'S LIST
SP2019 KONIG PRIZE IN LAW AND HISTORY
FL2019 THETA ALPHA KAPPA - RELIGIOUS STUDIES HONOR SOCIETY
FL2019 DEAN'S LIST
FL2020 DEAN'S LIST
SP2021 ALEENE SCHNEIDER ZAWADA AWARD FOR OUTSTANDING STUDENTS IN JEWISH STUDIES
SP2021 DISTINCTION IN JEWISH, ISLAMIC AND MIDDLE EASTERN STUDIES
FL2021 DEAN'S LIST
SP2022 DEAN'S LIST
SP2022 HONOR SCHOLAR AWARD
FL2022 DEAN'S LIST

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

Washington University in St. Louis

Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

Washington University in St. Louis is accredited by the Higher Learning Commission www.hlcommission.org, and its schools by various professional accrediting bodies. The CEEB code is 6929.

Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

Washington University in St. Louis
SCHOOL OF LAW

December 20, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Emily Fox

Dear Judge Davis:

I write to recommend my student Emily Fox, Washington University School of Law class of 2024, to serve as one of your law clerks beginning in the summer or fall of 2024. Emily is a whip-smart, enthusiastic, highly engaging student. I believe she will make an outstanding law clerk and a formidable attorney.

Emily has a stellar academic record. Her sparking 1L grades placed her seventh in her class, securely in the top three percent. She did not achieve less than an A-minus in any first-year course. She serves on the *Law Review*. Her success in law school follows an equally brilliant undergraduate career here at Washington University, where she earned a 3.9 grade average while majoring in Jewish, Islamic, and Middle Eastern Studies and winning the Konig Prize in Law and History.

I have had the pleasure of teaching Emily in my first-year Constitutional Law course and my upper-level Legislation course. In Constitutional Law, she wrote one of the strongest exams in the class, getting a grade comfortably in the "A" range. That performance only confirmed my initial sense of her abilities. Early in the semester, she asked to borrow my copy of Justice Sotomayor's memoir. She explained that she needed to write a lecture to introduce Justice Sotomayor, who was visiting our campus and speaking to an undergraduate constitutional law class, taught by my eminent colleague Lee Epstein, for which Emily served as a teaching assistant. Three things about this encounter impressed me. First, Emily as an undergraduate had impressed Lee enough to get hired as both her teaching assistant and research assistant. I know of no other instance when Lee has hired a 1L for either job. Second, Emily told me in great depth about why she particularly admired Justice Sotomayor as a person and a jurist. Again, very few 1Ls show that degree of reflection. Third, after Emily wrote her lecture, she promptly returned the book to me. In my experience, that diligence places her in the 99th percentile of humanity.

The Legislation course provides much more opportunity for discussion, and Emily was an intellectual leader in the classroom. Her questions and comments, both in class and during office hours, showed great insight and poise. She has serious intellectual curiosity, with a strong desire to understand ideas and principles behind the law. She was much more likely than her classmates to ask critical questions, probing beneath the surface doctrine to explore the policy and political implications of the material. She listens carefully; she speaks and writes clearly and intelligently. I was especially impressed to learn that Emily had formed a reading group with two friends to dig deeply into recent important Supreme Court decisions. That project has nothing to do with Emily's immediate law school courses. She just wants to learn more.

Emily has already gained valuable professional experience that should help her hit the ground running as a judicial clerk. She served during her third semester as an extern for Judge Gruender on the Eighth Circuit. She spent her first law school summer at Bryan Cave in St. Louis. As Lee Epstein's research assistant, Emily performed detailed research on the Supreme Court and the federal judicial system. At this early stage in her legal training, she aspires to a career in litigation. She well understands the value of a clerkship for deepening her knowledge and skills.

Emily has a big personality, in the best sense. She never dominates conversations, but her classmates seem to pay close attention when she speaks up. She takes easily to engaging in a wide range of topics, and she radiates the kind of focus and self-assurance that characterizes many successful lawyers. I feel confident that, in addition to her substantive skills, she will bring a positive energy to the close confines of a judge's chambers.

Emily Fox is on a clear path to becoming one of this law school's leading lights. I respectfully urge you to give her serious consideration.

Best,

/s/

Gregory Magarian - gpmagarian@wustl.edu - (314) 935- 3394

Gregory P. Magarian
Thomas and Karole Green Professor of Law

Washington University School of Law
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July 19, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Emily Fox

Dear Judge Davis:

I am writing to recommend Emily Fox, a member of the Class of 2024 at Washington University School of Law, ranked #7 in the class, and is an editor of the Washington University Law Review, for a clerkship in your chambers. I think she'd make an outstanding law clerk and I strongly encourage you to hire her.

I got to know Emily this past spring while she was enrolled in my first-year Criminal Law course. She was one of the star performers. She was one of the most reliable students during "cold calls"; I knew that whenever I called on her, she'd be well prepared, having done the reading closely and—more importantly—having understood it on a deep level. She was also a regular contributor to class discussion; she liked getting into the weeds on doctrinal questions such as the choice between competing approaches under the common law's and the Model Penal Code's approaches to different questions of criminal liability. She also was eager to discuss the criminal law's hard questions about moral responsibility and blame. While some students approach criminal law from a very ideological perspective, her approach was nuanced and sophisticated. She understood the competing goals criminal law had to weigh and argued for crafting doctrine in a way that set the right balance.

Given her outstanding classroom performance, I was anything but surprised when Emily got a 4.12 (A+) in the class on her exam, a tie for the highest grade. The exam was demanding and designed to test the full range of material we covered. It had 50 multiple-choice questions and two essays (one a traditional issue-spotter and one designed to test policy issues). She managed to nail the whole thing, demonstrating deep knowledge of the doctrinal rules, thoughtful analysis of normative questions, good writing skills, and the ability to work well under pressure (it was a four-hour exam that many students struggled to complete). That performance was no fluke; as noted above, Emily is one of our top students at WashULaw. That's saying a lot these days—WashULaw is now the #16 law school in the country, and by the numbers our students are as strong or stronger than most top 10 schools. We've achieved that success in part through our generous use of merit scholarships, of which Emily is a recipient; that's certainly been a good investment on the school's part.

I think Emily has the skills she needs to really thrive in a judicial chambers. She loves the law and wants nothing more than the opportunity to really dig in on hard research questions. That comes from her academic passion for textual analysis which began in college when she carefully studied religious texts. She'd be exactly the kind of clerk you'd want to dig into a complex statutory scheme. She'd work hard and would try to get you the best answer to the question based on what the law—not her policy preferences—provides. She's also a person you'd really enjoy having in chambers. She came to see me during office hours over the course of the semester; I very much enjoyed her enthusiasm for the course and for the law. She has the ambition she needs to succeed at the highest echelon of her profession, and I think she's headed for great things in her career.

For these reasons, I think Emily would be a fantastic hire. Please don't hesitate to contact me via email (epps@wustl.edu) or phone (cell: 6172590109) if you have any questions about Emily's application.

Best,

/s/

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Washington University in St. Louis
SCHOOL OF LAW

June 15, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Emily Fox

Dear Judge Davis:

I write to recommend my student, Emily Fox, for a clerkship in your chambers. I was fortunate to get to know Emily as a student in my Property Law class in the fall of 2021. Of all the students in that Property Law class (representing roughly 1/3 of the WashULaw 1L class), Emily has earned my highest recommendation this year. Not only did Emily excel in the class, but she impressed me with her work ethic, attention to detail, and analytical reasoning skills. I know she would be an asset to your chambers.

In Property Law, Emily participated in class often. She performed well when cold-called, and when volunteering to contribute, her comments were thoughtful and clear. She often attended office hours, and her intellectual curiosity was apparent. I assign the students a two-question in-class midterm exam halfway through the semester, and I selected Emily's answer to the first question as a model for other students due to its clarity, accuracy, and thorough analysis. I selected her answer through a process of blind review, but I was not surprised to find that it was hers.

It was also not a surprise when Emily received one of the highest grades in the class on the final exam. Out of 93 students, Emily tied with another student for third place in the class. She also received the highest score of any student on the most difficult question on the exam, a question that combined doctrinal and policy analysis regarding light projections on privately owned buildings. I selected her answer to that question (again through blind review) as the model answer for use in my memo to the students about the final exam.

Emily has thought deeply about the ways clerking would enable her to serve the broader public while also providing her with an invaluable learning experience. Emily writes that "spending a year clerking will allow me to delve deeper into understanding how the law is applied to various situations." She believes that "clerking will grant an opportunity to further engage with the study of law" by not only learning "how the law is made but being able to help write opinions myself in a way that can explain to the general publicwhy the decision had to come out as it is." She seeks to "learn how to account for differing points of view in my writing," believing that this "will not only make me a better advocate when I embark on my long-term career in a law firm, but it will make me a better thinker and community member in helping to increase my social awareness of other people's points of view."

Emily is also someone I would enjoy being around in the context of a clerkship. As a former clerk myself, I know that compatibility between judges and their clerks and between clerks themselves is important. Emily is not just intelligent. She is also polite and thoughtful, and she would work well with you and with her colleagues.

Please let me know if you need any more information about Emily. I can be reached by email at rsachs@wustl.edu or phone at (314)-935-8557.

Best,

/s/

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Writing Sample

The attached writing sample is an adaptation of the open appellate brief I prepared for my Legal Writing II: Advocacy course. I reworked the writing style and substantive analysis following completion of the course. I represented the Appellee, the United States, in connection with the prosecution of Henry Tanner for possession of cocaine. DEA Agents Roberta Halston and Amy Renner seized cocaine from Defendant Henry Tanner's apartment after obtaining consent to search from his co-tenant, Mary Potter. This assignment required that I research and analyze relevant case law to persuade the Court to deny Defendant's motion to suppress the cocaine seized from his apartment. The following brief sets forth my argument to the United States Court of Appeals for the Seventh Circuit and incorporates feedback from my Legal Practice professor.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The UNITED STATES OF AMERICA,
Appellee,

-against-

HENRY NOSTRUM TANNER,
Appellant.

Case No. 22-0062

BRIEF FOR THE UNITED STATES

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OPINION BELOW

On November 12, 2021, the district court[1] denied Henry Tanner's ("Defendant") motion to suppress physical evidence. The District Court held that the search and seizure of Defendant's cocaine ("Search") comported with Defendant's Fourth Amendment rights because it was conducted pursuant to valid consent from Defendant's co-tenant, Mary Potter ("Co-tenant Potter"). The district court order is unpublished, but a copy is included in the attached record. (R. at 20–22.)

ISSUE PRESENTED

Whether the District Court correctly denied Defendant's motion to suppress on the grounds that the Search comported with Defendant's Fourth Amendment rights.

STATEMENT OF THE CASE

On September 23, 2021, Defendant was indicted on three counts: (1) 21 U.S.C. § 841(a)(1), possession with intent to distribute a controlled substance; (2) 21 U.S.C. § 844, possession of a controlled substance; and (3) 21 U.S.C. § 846, conspiracy to possess, with intent to distribute, a controlled substance. (R. at 1–2.)

[1] The Honorable Marcia L. Fenster, United States District Court for the Northern District of Indiana.

After the District Court denied Defendant's motion to suppress, Defendant pled guilty to Count Two on December 17, 2021. (R. at 23.)

Defendant resides at 3471A Oak Street in Riley, Indiana (the "Apartment") with his friend, Co-tenant Potter, and cousin, Olivia Tudor ("Co-tenant Tudor"). (R. at 13.) The co-tenants met as students at Bradford College. (R. at 14.) The three co-tenants have developed close relationships with each other while living together. They share the common areas of the Apartment: the living room, dining room, kitchen, and two bathrooms. (R. at 6.) Defendant updates Co-tenant Potter on his whereabouts during the week, and Co-tenant Potter and Co-tenant Tudor regularly share clothes. (R. at 14.)

DEA Agents Roberta Halston and Amy Renner ("Agents") were investigating the drug ring at Bradford College when they arrived at the Apartment on September 16, 2021. The Agents intended to meet with Defendant and discuss his potential involvement in the drug ring. They hoped to rule Defendant out as a suspect. (R. at 14.) Upon their arrival, Co-tenant Potter answered the door and invited the Agents into the Apartment. The Agents discussed the severe drug problem at Bradford College with Co-tenant Potter. (R. at 6.) When the Agents asked Co-tenant Potter questions about the living arrangement at the Apartment, she answered willingly and completely. Co-tenant Potter revealed that the three co-tenants have a trusting and open lifestyle. When Co-tenant Potter moved into the

Apartment in August 2021, both Defendant and Co-tenant Tudor told her she could use all areas of the Apartment. (R. at 6.) Defendant trusts Co-tenant Potter so much so that he allows her to use his bathroom ("Bathroom"), which is only accessible by walking through his bedroom. (R. at 6.)

During their conversation, the Agents looked around the Apartment to confirm Co-tenant Potter lived there. (R. at 7.) Once convinced Co-tenant Potter lived at the Apartment, the Agents obtained her consent to search. Co-tenant Potter willingly signed the consent form after thoughtfully considering the gravity of the situation. After Co-tenant Potter signed the consent form, Agent Halston began the Search as she typically would: she started from the outermost area of the Apartment (the Bathroom) and worked her way back. (R. at 7.) She searched the entire Bathroom, including an unmarked, unlocked bag ("Bag") placed on an open shelf. (R. at 8.) Inside the Bag, Agent Halston found a bag of cocaine. At this point, Defendant returned home and was arrested by the Agents. (R. at 10.)

SUMMARY OF ARGUMENT

The District Court's denial of Defendant's motion to suppress should be affirmed because the Search comported with Defendant's Fourth Amendment rights. Thus, Defendant's conviction should be upheld.

Co-tenant Potter had authority to consent to the Search as a co-tenant at the Apartment. She willingly and knowingly consented to the Search, granting Agent

Halston permission to search anywhere in the Apartment Co-tenant Potter had authority to be and anything Co-tenant Potter had authority to use. Because Defendant granted Co-tenant Potter unqualified access to the Bathroom, Co-tenant Potter had actual authority to consent to its search. The Agents were thus permitted to search anything within the Bathroom that could have been under Co-tenant Potter's authority and contained drugs.

Even if Co-tenant Potter did not have actual authority to consent to a search of the Apartment, she had apparent authority to consent. After their conversation, the Agents believed Co-tenant Potter lived at the Apartment and could use the Bathroom. Agent Halston could not have exceeded the scope of Co-tenant Potter's apparent authority by searching the Bag because she reasonably believed Co-tenant Potter had authority over the Bag. Since Co-tenant Potter had actual, or at least apparent, authority to consent, and voluntarily did so, the Search comported with Defendant's Fourth Amendment rights, and his motion to suppress should be denied.

ARGUMENT

This Court reviews motions to suppress physical evidence *de novo*. *United States v. Groves*, 470 F.3d 311, 317–18 (7th Cir. 2006). Because a review of the totality of the circumstances proves that Co-tenant Potter had authority to consent to the Search and voluntarily did so, Defendant's motion to suppress must be

denied. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Co-tenant Potter's consent was voluntary because she contemplated her decision before consenting, her education level suggests she easily understood the Agents' request for consent, and she was not coerced into consenting. *See Schneckloth*, 412 U.S. at 248 (finding voluntariness of consent accounts for education level, intelligence, and interactions with officers). The totality of the circumstances demonstrates that Co-tenant Potter voluntarily consented to the Search, and she had actual and apparent authority to do so. Thus, Defendant's motion to suppress must be denied.

I. Defendant's Motion to Suppress Must be Denied Because Co-tenant Potter Had Actual Authority to Consent to the Search.

Co-tenant Potter had actual authority to consent because she and her co-tenants permitted each other to "mutual[ly] use [] the property" and have "joint access or control for most purposes." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Co-tenant Potter, Co-tenant Tudor, and Defendant share joint access over the Apartment because they all live there, receive mail there, and keep clothes and personal belongings there. *See United States v. Denberg,* 212 F.3d 987, 991 (7th Cir. 2000) (joint access found when third party told officers she lived on premises, received mail, and kept clothes and personal belongings there). The Agents even confirmed that Co-tenant Potter had personal belongings in her bedroom before proceeding with the Search. Each co-tenant reduced his or her expectation of privacy by choosing to grant each other access to all of the common areas in the

Apartment. Because Co-tenant Potter had joint access to the Apartment, she had actual authority to consent to its search.

A. Co-tenant Potter's Actual Authority over the Bathroom Allowed Her to Validly Consent to its Search.

By choosing to reduce his expectation of privacy and grant Co-tenant Potter permission to "use [his] bathroom if she wanted to," Defendant gave Co-tenant Potter actual authority over the Bathroom. (R. at 6.) Co-tenant Potter's ability to consent to the Bathroom's search arose directly from her unfettered ability to use it. *See Matlock*, 415 U.S. at 170 (finding co-tenant had actual authority to consent to search of east bedroom because co-tenant used the bedroom). Defendant's conscious choice to allow Co-tenant Potter to use the Bathroom was an assumption of the risk that she may allow someone to enter the Bathroom. After all, "[o]ne who shares a house or room or auto with another understands that the partner may invite strangers—that his privacy is not absolute but contingent in large measure on the decisions of another." *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990).

This court has repeatedly held that, where a defendant consents to a co-tenant's use of his space, he grants that co-tenant actual authority over that space. *See Chaidez*, 919 F.2d at 1202 (actual authority to consent to the search of every room in the house existed where lessee paid utilities and rent, had clothing in the bedroom, and could use the premises when defendant wasn't present); *United*

States v. Aghedo, 159 F.3d 308, 310 (7th Cir. 1998) (co-tenant had actual authority to consent to search of the defendant's bedroom because the defendant granted her complete access to use the bedroom and allowed her to enter when he wasn't present). Co-tenant Potter's actual authority, too, arose from Defendant allowing her to use the Bathroom unconditionally. Since Defendant gave Co-tenant Potter actual authority to consent to a search of the Bathroom, his Fourth Amendment rights could not have been violated by the Search.

B. The Scope of Co-Tenant Potter's Consent Validly Extended to the Search of the Bag.

Through granting the Agents unconditional consent to search the Apartment, Co-tenant Potter gave the Agents power to search any item that could include the expressed object of the Search. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object."). By focusing their discussion on Defendant's potential involvement in the Bradford College drug ring, the Agents made Co-tenant Potter implicitly aware that her consent to search the Apartment included any objects that could be used to hide narcotics. "A reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Jimeno*, 500 U.S. at 251. Therefore, Co-tenant Potter's authority to consent extended to any container that could be used to hold drugs.

Where the scope of the search is confined to its expressed object, this Court has denied motions to suppress. In *United States v. Ladell*, when the third party had

actual authority to consent to a search of the defendant's bedroom and knew that the officer was searching for guns, this Court held that the officer's search of a bag underneath the defendant's mattress was valid. *See* 127 F.3d 622, 624 (7th Cir. 1997). If this Court found no issue with officers searching for guns in a black, unmarked bag hidden from view underneath defendant's mattress, the scope of Co-tenant Potter's consent should easily have included the Bag on an open shelf.

Similarly, in *United States v. Melgar*, this Court denied the defendant's motion to suppress physical evidence found in a purse because the consenting party had actual authority to consent to a search of the area in which the purse was found, and the purse could have contained the expressed object of the search. *See* 227 F.3d 1038, 1041–42 (7th Cir. 2000). The purse searched in *Melgar* is afforded a considerably greater expectation of privacy than the Bag since a purse is an "extension of one's clothing because it serves as a larger pocket." *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (internal quotations omitted). Yet this Court still found the search valid because the purse could have contained the expressed object of the search. If an unmarked purse could be searched pursuant to third-party consent because it could contain the expressed object of the search, there is no denying Co-tenant Potter's consent included the authorization to search the Bag.

The touchstone of Fourth Amendment protection is reasonableness. *See Jimeno*, 500 U.S. at 250. Yet, it would not have been reasonable for Agent Halston to ask Co-tenant Potter for her consent to search every unmarked item within the Bathroom that could have contained narcotics. Rather, Agent Halston's search reasonably focused only on things within the Bathroom that could have belonged to Co-tenant Potter and contained drugs. Because Defendant, Co-tenant Potter, and Co-tenant Tudor all had the right to use the Bathroom, the Agents had no reason to believe that the Bag belonged specifically to Defendant. It was Co-tenant Potter's responsibility to inform the Agents if an item was outside her control since she voluntarily informed the Agents about her actual authority over the Bathroom. In only searching containers within the Bathroom that could contain drugs, Agent Halston comported with Defendant's Fourth Amendment rights, and his motion to suppress should be denied.

II. Even If Co-tenant Potter Did Not Have Actual Authority to Consent to the Search, She Had Apparent Authority Over the Common Areas.

The Agents conducted a valid search of the premises under Co-tenant Potter's apparent authority, at the very least, because they reasonably believed Co-tenant Potter had authority to consent to the Search. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Where, like here, a search is reasonable, apparent authority is all that is necessary to justify a search pursuant to third-party consent. *See, e.g.*, *Rodriguez*, 497 U.S. at 187. The Search comports with the Fourth Amendment

because the Agents determined Co-tenant Potter had apparent authority by uncovering "indicia of [her] actual authority" over the Apartment. *United States v. Rosario*, 962 F.2d 733, 737 (1992).

A seasoned DEA agent like Agent Halston reasonably concluded that Co-tenant Potter's statements regarding her use of the Apartment revealed her apparent authority to consent to the Search. Not only did Co-tenant Potter live at the Apartment, but Co-tenant Potter kept her personal belongings there and told the Agents she had unfettered access to the Apartment. Co-tenant Potter corroborated her statements by detailing the living arrangements at the Apartment and giving the Agents reason to believe that she actually lived there. *See United States v. Ryerson*, 545 F.3d 483, 489 (7th Cir. 2008) (found apparent authority to search garage where co-tenant was allowed entry to house, had personal items there, and knew about specifics of premises). By relying on Co-tenant Potter's statements and actions, the Agents drew reasonable inferences about Co-tenant Potter's authority to consent. Because the Agents had no reason to doubt Co-tenant Potter's statements, they reasonably concluded that she had apparent authority to consent to the Search.

A. Co-tenant Potter had Apparent Authority to Consent to the Search of the Bathroom.

Co-tenant Potter had apparent authority over the Bathroom because, after hearing her statements about her unfettered access to the Bathroom, any reasonable agent would have concluded that Co-tenant Potter had authority to use the

Bathroom and thus consent to its search. Nothing more is needed to uphold the Search's validity. *See United States v. Garcia*, 690 F.3d 860, 864 (7th Cir. 2012) (search uncovering cocaine in closet was upheld because third party had at least apparent authority over the closet even though she did not live at the apartment).

Co-tenant Potter's relationship with Defendant would lead any reasonable agent to believe Co-tenant Potter when she said she was allowed to use the Bathroom. Defendant trusted Co-tenant Potter to use private areas of his space. Defendant even allowed Co-tenant Potter to walk through his room to access the Bathroom. Apparent authority is more readily ascertainable here than in *Garcia* because bathrooms are more likely to be shared than closets, especially by people who live together. The Agents had no reason to distrust Co-tenant Potter's representations about her relationship with Defendant and her unrestricted access to the Bathroom. Because the Agents based their finding of Co-tenant Potter's authority to consent on assertions by Co-tenant Potter that, if true, would grant her actual authority over the Bathroom, their search of the Bathroom comported with Defendant's Fourth Amendment rights.

B. Co-tenant Potter had Apparent Authority to Consent to the Search of the Bag.

Co-tenant Potter had apparent authority to consent to the search of the Bag because the Agents reasonably believed she had authority over any item in the Bathroom. Co-tenant Potter made no efforts to inform the Agents that she did not

have access to the Bag. *Compare Basinski*, 226 F.3d at 835 (finding locked container outside the scope of the search when the officers had knowledge that the container belonged to the defendant and the consenting party was not given the lock combination) *with United States v. Jackson*, 598 F.3d 340, 343 (7th Cir. 2010) (third party had apparent authority over a computer bag where third party gave the officers unlimited consent to search and the officers had no reason to know that the defendant forbade the search).

Defendant assumed the risk that the Bag would be subject to search when he stored it on an open shelf in the Bathroom and did not mark nor lock it. Neither the characteristics of the Bag nor the surrounding circumstances revealed one, particular owner of the Bag. Thus, from looking at the Bag, the Agents had no reason to believe the Bag could not nor did not belong to Co-tenant Potter. Further, without qualifying her consent, Co-tenant Potter gave the Agents no reason to believe she did not have authority over the Bag. No fault should lie on the seasoned Agents for acting in accordance with the information they were given at the time. *See Rodriguez*, 497 U.S. at 185 (reasonableness of the search is determined based on what the Agents knew at the time of the search). Because Co-tenant Potter's apparent authority extended over all containers in the Bathroom that could have been hers, the Agents' search of the Bag was reasonable.

CONCLUSION

Co-tenant Potter's residence at the Apartment and use of all its common areas gave her actual authority to consent to the Search. Even if she did not have actual authority to consent, the representations she made when conversing with the Agents led them to reasonably believe she had apparent authority to consent to a search over the Bathroom and any items within it that could have been hers, including the Bag. The Agents should not be faulted for relying on Co-tenant Potter's statements to conduct a lawful search of the Apartment. For the foregoing reasons, the Search did not violate Defendant's Fourth Amendment Rights. Thus, this Court should deny Defendant's motion to suppress and affirm his conviction.

Respectfully Submitted,

Dated:_____

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Writing Sample: Law Review Note

The attached writing sample is the complete version of the note I submitted for publication consideration at *Washington University Law Review*. No changes have been made since I submitted it for publication consideration. This note analyzes the feasibility of adopting a third-gender category to regulate transgender-athlete participation in elite sport. I consider why a state-imposed third-gender category would fail intermediate scrutiny and how state public accommodation statutes would prevent private sport governing bodies from implementing a third-gender category.

Fairness for all? The Implications of Adopting a Third-Gender Category in Elite Sports

I. INTRODUCTION

On March 18, 2022, the NCAA Women's Division I Swimming and Diving Championships garnered national attention for more than just the record-breaking swims. The second day of competition saw Lia Thomas, the first known openly transgender athlete to compete at the NCAA Championships, beat out a field of Olympians in the 500 yard freestyle.[1] Even though Thomas competed in accordance with the NCAA's transgender-athlete guidelines, and finished nine seconds behind Katie Ledecky's American record,[2] cries of concern and outrage poured in

[1] Dan D'Addona, *2022 NCAA Women's Championships Day 2 Finals: Lia Thomas Wins 500 Freestyle 'It Means the World*,' SWIMMING WORLD MAG. (Mar. 17, 2022), https://www.swimmingworldmagazine.com/news/the-2022-ncaa-womens-championships-day-2-finals-500-freestyle/. Thomas also placed fifth in the 200-yard freestyle and eighth in the 100-yard freestyle.

[2] For reference, if Ledecky had been racing against Thomas, Ledecky would have finished over half a pool length before Thomas did. At the 2022 NCAA Championships, the difference between first (Thomas) and second (Emma Weyant) was only one-and-a-half seconds. *See 2022 NCAA Division I Women's Swimming & Diving Championships Results*, HY-TEK'S MEET MANAGER 7.0, https://swimswam.com/wp-content/uploads/2022/03/2022-NCAA-Division-I-Women-Swimming-Diving-Championships-Final-Results.pdf.

against Thomas from across the nation.[3] Thomas's participation highlights the questions facing elite sports organizations[4] today: who can compete, in what category, and what must athletes do to be eligible.

Elite sports in the modern era are governed by a complex network of private organizations. Within the United States, the Ted Stevens Amateur Sports Act grants the United States Olympic and Paralympic Committee (USOPC) the power to recognize national governing bodies (NGBs) for any sport that is included on the program of the Olympic, Paralympic, or Pan-American Games.[5] To be eligible for recognition, an NGB must, among other requirements, be the member

[3] Sarah Berman, *Protestors Against Lia Thomas Stand Outside & Attend Women's NCAA Championship,* SWIM SWAM NEWS (Mar. 17, 2022), https://swimswam.com/protestors-against-lia-thomas-stand-outside-attend-womens-ncaa-championship/.

[4] This note will focus on elite sports. The NCAA Division I Swimming and Diving Championships are still a relevant example of the problems facing elite sports in implementing transgender-inclusive participation policies because a majority of All-Americans (the top eight finishers per event at NCAAs) are USA Swimming National Team Members. *Compare* James Sutherland, *CSCAA Announces 2021-22 NCAA Division I Women's All-Americans*, SWIM SWAM NEWS (Mar. 30, 2022), https://swimswam.com/cscaa-announces-2021-22-ncaa-division-i-womens-all-americans/, *with* USA SWIMMING, *Women's National Team 2022-2023 Roster*, https://www.usaswimming.org/docs/default-source/national-teamdocuments/rosters/2022-2023-nt-roster-women-final.pdf.

[5] 36 U.S.C. § 220521(a).

of "no more than one international sports federation."[6] Once recognized as members of their respective international federations (IFs),[7] NGBs are part of the Olympic movement[8] and receive instruction from the International Olympic Committee (IOC).[9] Outside of IOC guidelines, NGBs are typically given considerable leeway to regulate sports. Dionne Koller, a professor of sports law, argues that the federal government's hands-off approach to regulating sports "has translated into a generous degree of legal insulation for sports leagues, administrators, and regulators, especially in the way that they manage athletes and structure the games."[10]

[6] 36 U.S.C. § 220522(a)(6). After recognition, the USOPC recommends and supports the NGB "to the appropriate international sports federation as the representative of the United States for that sport." 36 U.S.C. § 220531(c).

[7] International Federations, as recognized by the Olympic Charter, are authorized by the International Olympic Committee "to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application." INT'L OLYMPIC COMM., *Olympic Charter*, 56 (2021).

[8] "The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism." INT'L OLYMPIC COMM., *Olympic Movement* (2021), https://olympics.com/ioc/olympic-movement#:~:text=Olympic-,Movement,by%20the%20values%20of%20Olympism.

[9] INT'L OLYMPIC COMM., *Olympic Charter*, *supra* note 7 at 12.

[10] Dionne L. Koller, *Putting Public Law into Private Sport*, 43 PEPP. L. REV. 681, 688 (2016).

The power structure created by the Olympic Charter and the Ted Stevens Act grants IFs great influence over the policies within the sports they oversee, including how competition will be categorized.[11] Until recently, the separation of elite sport competition into male and female categories has been accepted without controversy. However, as Lia Thomas's participation in elite swimming demonstrates, "[t]he creation of a separate category for female athletes inevitably leads to a fundamental conundrum—precisely who should be allowed to compete in women's sports?"[12]

In 2022, the IF regulating international aquatic sports, World Aquatics,[13] attempted to answer this question by proposing a third-gender category for all female-identifying athletes whose testosterone levels are too high to compete in the female category.[14] This note explores how World

[11] To use aquatic sports as an example, "the national body governing swimming, open water swimming, diving, high diving, water polo, artistic swimming, and Masters in any country or Sport Country shall be eligible to become a FINA member" under World Aquatics's constitution. Once a member, a NGB is obliged to comply with World Aquatics's rules at all times, including directives and decisions of the World Aquatics bodies. FEDERATION INTERNATIONALE DE NATATION CONST. C 7–8. (FINA is now known as World Aquatics).

[12] Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS. 139, 139 (2017).

[13] World Aquatics was previously known as Federation Internationale de Natation. World Aquatics's primary purpose is to promote and encourage the advancement of aquatics in all possible aspects throughout the world. *See* FEDERATION INTERNATIONALE DE NATATION, *Policy on Eligibility for the Men's and Women's Competition Categories* 9 (Jun. 2022) [hereinafter "World Aquatics Policy"].

[14] *See Id.* at 9; *infra* Part II.a.

Aquatics's proposed third-gender category would fare under the laws of the United States if implemented by United States sports-governing bodies. Part II summarizes the preexisting barriers to elite competition for transwomen athletes and discusses how World Aquatics's proposal would further eliminate any possibilities for transwomen athletes to compete in line with their gender identity. The remaining parts explain the legal challenges United States sports organizations will face if they choose to implement a third-gender category. Because states have already begun regulating transgender participation in scholastic sports, it is not unreasonable to assume they may take further measures to regulate transgender participation in all sporting activities within their borders.[15] Part III focuses on the likely constitutional challenges state actors will face under the Equal Protection Clause of the Fourteenth Amendment should they try to enact a third-gender

[15] Several states have already taken measures to regulate transgender-athlete participation in women's sports within their borders. Those statutes reaching collegiate sports impact elite athletes on their teams. *See* ARIZ. REV. STAT. ANN. § 15-120.02 (2022); ARK. CODE ANN. § 6-1-107 (2021); FLA. STAT. § 1006.205 (2021); IDAHO CODE § 33-6203 (2020) (preliminarily enjoined by Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020)); IND. CODE § 20-33-13-1-4 (2022); IOWA CODE § 261I.1 (2022); LA. STAT. ANN. 4:441-446 (2022); MISS. CODE ANN. § 27-97-1 (2021); MONT. CODE ANN. § 20-7-1306 (2021); OKLA. STAT. tit. 70, § 27-106 (2022); S.C. CODE ANN. § 59-1-500 (2022); TENN. CODE ANN. § 49-7-181 (2022); TEX. EDUC. CODE ANN. § 33.0834 (West 2022); W. VA. CODE § 18-2-25d (2021) (preliminarily enjoined by B. P. J. v. W. Va. State Bd. Of Educ., 550 F. Supp. 3d 347 (S.D.W. Va. 2021)).

category by law. Part IV discusses how non-state actor private sports organizations,[16] like NGBs, would be liable under state public accommodations statutes[17] and fail the Ted Stevens Act's NGB recognition requirements[18] if they attempted to implement a third-gender category. By providing a roadmap of a potential legal challenge to a third-gender category in both scenarios, this note cautions sports regulatory bodies against adopting a third-gender category within elite sports.[19]

II. TRANSWOMEN ATHLETES IN ELITE SPORT: BARRIERS TO PARTICIPATION

[16] While authorized by Congress through the Ted Stevens Act, neither the USOPC nor NGBs are state actors. Thus, they are not subject to constitutional restraints. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542–44 (1987); Behagen v. Amateur Basketball Ass'n, 884 F.2d 524, 530–31 (10th Cir. 1989) (holding NGBs are at least nominally private parties because they are farther removed from congressional action than USOPC).

[17] Many states have public accommodations statutes that prohibit discrimination based on sex or gender identity in public accommodations. *See infra* note 154.

[18] An amateur sports organization, like an NGB, is eligible for recognition only if it "provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition without discrimination on the basis of . . . sex . . . ." 36 U.S.C. § 220522(a)(8). All elite athletes, including professionals, who wish to compete on the international stage are still governed by NGBs. *See* 36 U.S.C. § 220523(a)(6).

[19] A discussion of the significant practical concerns that also caution against adopting a third-gender category to regulate transwomen participation in elite sport is outside the scope of my note. I will focus solely on the legal challenges such a category may face if adopted in the United States.

Transwomen athletes bear the brunt of the "who can compete as a female" conundrum. Yet, outside of sports, transgender women are largely not required to qualify their womanhood.[20] Whether due to lack of resources or social stigma, transgender women are often unable to transition from their sex assigned at birth until after male puberty impacts their biological development.[21] In the context of sports, the potential post-puberty biological advantage transgender women may have over cisgender women has prompted regulation of transgender women's participation in elite sport. In the mid-2000s, gender verification in sport shifted from genetic sex testing to hormone testing; scientists settled on testosterone levels as the key to determining the advantage male athletes have

[20] Transgender individuals "are those who have a gender identity that is not fully aligned with their sex assigned at birth." AMERICAN PSYCHOLOGICAL ASS'N, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 1 (2015). Nations embrace transgender individuals to a variety of degrees. While transgender individuals are accepted in the United States as equal citizens, acceptance of transgender individuals is not universal. *See generally* United Nations Human Rights Office of the High Comm'r, *The Struggle of Trans and Gender-diverse Persons*, UNITED NATIONS (2022), https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons.

[21] *See infra* Part III.c.2.ii.

over females.[22] Hormonal regulation of testosterone levels is now assumed to come as a price transwomen athletes must pay should they want to compete in line with their gender identity.[23]

Even as hormone regulation technology and social norms develop, the IOC and IFs continue to confront basic issues of how to categorize athletes while respecting their dignity and gender identity. In elite sports, the IOC instructs IFs to independently determine eligibility criteria

[22] Ashley J. Bassett et al., *The Biology of Sex and Sport*, 8 J. BONE & JOINT SURGERY, INC. 1, 2 (2020). *See also* Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 74 (2017) ("Although other factors are influential, the average 10–12% performance gap between non-doped elite male and elite female athletes is almost entirely attributable to the bimodal and non-overlapping production of testosterone, including to these testosterone-driven attributes.").

[23] The United Nations has starkly criticized attempts by IAAF (now World Athletics) to classify female athletes based on their testosterone levels. The UN called World Athletics's plans "unnecessary, humiliating, and harmful." *See Caster Semenya: United Nations Criticises 'Humiliating" IAAF Rule*, B.B.C. (Mar. 25, 2019), https://www.bbc.com/sport/athletics/47690512. Yet, most IFs require transwomen athletes to regulate their testosterone levels to compete in the female category. *See infra* note 25 and accompanying text. Additionally, transition treatments typically include suppressing testosterone. *See* Cecile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY & UROLOGY 877, 889–90 (2016). Thus, this note assumes that some form of testosterone suppression will be required when regulating transwomen athlete participation in the female sports category.

for athletes who do not fit within traditional binary gender distinctions.[24] Each sport's specific regulations focus on outlining the requirements for non-cisgender female-identifying athletes to compete in the female category of their respective sports.[25] Because most IFs are currently grappling with how to allow transwomen athletes to compete in female-gender categories, this note will focus on the problems facing elite transwomen athletes.[26]

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[24] INT'L OLYMPIC COMM., *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (Nov. 2021).

[25] *See* World Aquatics Policy, *supra* note 13 at 7 (requiring transgender women to transition before Tanner Stage 2 or the age of 12 and to maintain testosterone levels of 2.5 nmol/L or lower post-transition); WORLD ATHLETICS, *Eligibility Regulations for Transgender Athletes* 4–5 (Oct. 2019) (requiring transgender women to maintain testosterone levels below 5 nmol/L for twelve months before competing); INTERNATIONAL TENNIS FEDERATION, *ITF Transgender Policy* 1 (Nov. 2018) (mirroring World Athletics's policy). For a comprehensive list of IF policies, see Transathlete.com, *International Federations*, (last visited Mar. 2, 2023). https://www.transathlete.com/international-federations#:~:text=Transgender%20women%20are%20only%20eligible,or%20lower%20since%20age%2012.

[26] Any policy proposals discussed would also apply to intersex athletes who are sometimes barred from competition due to their inability to conform with certain gender policies. *See* Basset et al., *supra* note 22, at 6 (discussing how individuals with hyperandrogenism and differences of sex development (DSD) or other intersex traits were most impacted in their eligibility to compete at the onset of hormone testing in elite sport based on their heightened testosterone levels).

a. World Aquatics's 2022 Proposal

World Aquatics proposed a novel method to maintain its traditional binary categories while allowing transgender athletes the opportunity to compete. World Aquatics's policy allows transwomen athletes to compete in the women's category[27] as long as they can prove to World Aquatics's satisfaction that they have not experienced any part of male puberty beyond Tanner Stage two[28] or before age twelve, whichever is later.[29] Yet, those transwomen athletes who do not transition at this early age would "not meet the applicable criteria for the . . . women's category."[30] These athletes would be relegated to a proposed third "open category . . . in which an athlete who

[27] If they so choose, transgender women are permitted under World Aquatics's policy to continue competing in the male category. *See* World Aquatics Policy, *supra* note 13, at 8–9. However, this option does not negate World Aquatics's policy's affront to transwomen athletes's desires to compete in line with their gender identity. Thus, it does not provide a solution to the problem of inclusion.

[28] "Tanner Stage 2 denotes the onset of puberty. The normal time of onset of puberty ranges from 8 to 13 years old in females, and from 9 to 14 years old in males." *Id.* at 4.

[29] *Id.* at 7. World Aquatics's 2022 Policy regarding hormone regulation has been codified in the most recent edition of its Competition Regulations. *See* WORLD AQUATICS, *Competition Regulations* 11–12 (Feb. 21, 2023).

[30] *Id.* at 9. It is unclear from World Aquatics's rules if these women would be able to compete in the female category without transitioning before puberty even if they were able to reduce their testosterone levels to be within the "normal range" for women via hormone treatments.

meets the eligibility criteria for that event would be able to compete without regard to their sex, their legal gender, or their gender identity."[31]

World Aquatics states that its policy will ensure equal opportunity of men and women in sport, competitive fairness and physical safety, and the development of the sport and its popular appeal.[32] Yet, by prioritizing gender-specific sport categories,[33] World Aquatics ensures that transgender athletes forced to compete in any promulgated third-gender category will be unable to compete in their gender-identity category. This proposal has been criticized by the transgender-athlete community as "the very definition of 'separate but equal' and an extreme indignity to the women affected."[34] While normative arguments may guide gut instincts as to whether elite transwomen athletes should ever be allowed to compete in the female category, this note primarily focuses on discounting the legal merits of World Aquatics's proposed "solution" to including transwomen athletes in elite sport. Our merits discussion begins with state actors.[35] If a state actor relegated transwomen athletes to a third-gender category, the state would fail to give those athletes an equal opportunity to compete in sports as the Constitution requires. Thus, we turn to the likely

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1.

[34] Simon Evans, "'Open Category' Proposal Faces Questions Over Fairness and Viability," REUTERS (Oct. 1, 2022), https://www.reuters.com/lifestyle/sports/open-category-proposal-faces-questions-over-fairness-viability-2022-06-23/.

[35] NGBs and other private sports organizations are not state actors. *See supra* note 16. Thus, their actions are constrained by other laws, as will be discussed in Part IV.

confrontation between a state's hypothetical third-gender category and the Equal Protection Clause of the Fourteenth Amendment.

III. STATE ACTORS: EQUAL PROTECTION CHALLENGES

The Equal Protection Clause of the Fourteenth Amendment forbids a state from denying "to any person within its jurisdiction the equal protection of the laws."[36] Current equal protection jurisprudence will allow a successful attack to a state-implemented third-gender category for transwomen athletes. For the purposes of this note, I will presume any adopted third-gender category proposal would adopt World Aquatics's condition that transwomen athletes can compete in the women's category so long as have not experienced male puberty "beyond Tanner Stage 2 or before age 12, whichever is later."[37] Thus, if transwomen athletes do not meet these standards, they may either compete in the male category or in "any open events," but they may not compete in the female category.[38]

a. Principles of Equal Protection Jurisprudence

Although the Equal Protection Clause was adopted to eradicate racial discrimination,[39] it has been successfully used by litigants to challenge other discriminatory government classifications. The Supreme Court adjudicates equal protection challenges under three tiers of scrutiny—strict, intermediate, or rational basis review.[40] Which level of scrutiny the Court applies

[36] U.S. CONST. amend. XIV, § 1, cl. 3.

[37] World Aquatics Policy, *supra* note 13, at 7. *See also supra* note 28.

[38] World Aquatics Policy, *supra* note 13, at 9.

[39] *See* The Slaughterhouse Cases, 83 U.S. 36, 67–69 (1872).

[40] NOAH FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 645 (20th ed.).

to the challenge depends on the suspect nature of the classification.[41] For example, because classifications based on race "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," they are reviewed under strict scrutiny.[42] Most laws do not pass this demanding standard.[43] Conversely, classifications receive rational basis review when courts do not believe fundamental rights or suspect classifications are at issue.[44] In this most lenient standard, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[45] This standard provides the government substantial leeway in regulating based on non-suspect classifications.[46]

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[41] Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 541 (2016).

[42] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). *See also* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135, 137 (2011) (discussing requirements for classification to receive strict scrutiny).

[43] Under strict scrutiny, "the government must demonstrate a compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose." Strauss, *supra* note 42, at 137.

[44] *See* Barry et al., *supra* note 41, at 542.

[45] *Cleburne*, 473 U.S. at 440.

[46] For example, in *FCC v. Beach Communications, Inc.*, the Supreme Court applied rational basis review to evaluate an equal protection challenge to franchising requirements under an FCC order. *See generally* 508 U.S. 307 (1993).

The Court has recognized that, between these two extremes, certain quasi-suspect classes are subjected to intermediate (or heightened) scrutiny. Sex is "only *quasi*-suspect because . . . the Supreme Court has recognized 'inherent differences' between the biological sexes that might provide appropriate justification for distinctions."[47] Any quasi-suspect classification "must serve important governmental objectives and must be substantially related to achievement of those objectives" to survive a constitutional attack.[48]

b. Transgender-status Discrimination: What Level of Scrutiny Applies?

While the tiers-of-scrutiny framework is well established, the Court has not delineated clear guidelines on how it determines which classification receives which level of scrutiny.[49] Lower courts are left to sift through "a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and nonsuspect classes is drawn in a haphazard way."[50] Thus, where the Supreme Court has not affirmatively applied a level of scrutiny

[47] Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (emphasis in original) (*citing* United States v. Virginia, 518 U.S. 513, 534 (1996)). The Supreme Court has used the terms "gender" and "sex" interchangeably in applying intermediate scrutiny. *See generally Virginia*, 518 U.S. at 531–58.

[48] Craig v. Boren, 429 U.S. 190, 197 (1976). *See also Virginia*, 518 U.S. at 531 ("Parties who seek to defend gender-based governmental action must demonstrate an "exceedingly persuasive justification" for that action.").

[49] Strauss, *supra* note 42, at 138.

[50] Thomas Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 141 (1990).